***United States Court of Appeals***

***for the Second Circuit***

# BRIEF FOR APPELLANT

# 77-7237

# United States Court of Appeals

FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
*Plaintiffs-Appellees,*

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, *et al.*,
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF PORT AUTHORITY DEFENDANTS-APPELLANTS


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## BRIEF OF PORT AUTHORITY DEFENDANTS-APPELLANTS

### Statement and Summary

This Court, in ordering an expedited appeal from the District Court's judgment, granted the Port Authority defendants permission to rely on the memoranda they had submitted below as well as the right to supplement those papers. These materials are being submitted pursuant to this authorization.

This is an appeal from the District Court's judgment in granting a motion by Air France and British Airways for summary judgment in their suit to invalidate a temporary ban which the Port Authority of New York and

New Jersey had placed on Concorde operations at John F. Kennedy International Airport (JFK). The airlines' moving papers below had argued that the ban invaded the field of air commerce regulation which the Federal Government had preempted, violated international agreements between the United States, France and the United Kingdom, and invalidly interfered with the Federal Government's authority to conduct foreign relations.

Our principal memorandum below, which is attached hereto in its entirety (pp. I-i to I-65), demonstrated, we believe, that Congress' intent in the field of air commerce regulation was not to preempt, but rather to preserve, the right of airport proprietors to impose non-discriminatory restrictions on the aircraft users of their air terminals like the temporary ban here at issue. The memorandum showed that Congress knowingly left all matters pertaining to the control and development of civil airports to the States and their political subdivisions and, as a consequence, these units of government are responsible for acquiring whatever avigation easements are required by the flight of low-level noisy aircraft, as well as being liable for whatever damages these aircraft inflict upon nearby property owners. The memorandum pointed to the report of the Senate Committee on the 1968 law, which for the first time empowered the FAA to certificate aircraft on the basis of noise considerations. The Senate report quoted with approval a letter submitted by the Secretary of Transportation which stated that:

> "'Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an

> airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" S. Rep. No. 1353, 90th Cong., 2d Sess. at p. 7 (1968).

In the same letter, also quoted in the Senate report, the DOT Secretary, although concluding that State and local governments are precluded from using their police power to control aircraft noise because such regulation would conflict with Federal regulation of air traffic and would invade a field preempted by the Federal Government, nevertheless stated in unequivocal language that:

> "'the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.'" S. Rep. No. 1353, 90th Cong., 2d Sess. p. 7 (1968).

Our memorandum showed that the foregoing represents the current Federal law on this subject, relying, *inter alia,* on the direct holding to this effect in *National Aviation* v. *City of Hayward,* 418 F. Supp. 417 (N.D. Cal., 1976).

Our memorandum went on to emphasize that without exception Federal administrative officials have concurred in

our interpretation of the law, including specifically former Secretary of Transportation Coleman. Thus, although Secretary Coleman in his February 4, 1976 Concorde decision granted Federal authorization for Concorde flights into JFK, our memorandum demonstrated that he nowhere purported to order or require such flights. With full knowledge of the Port Authority's temporary ban, he most definitely acquiesced in it, stating that under present Federal policy an airport proprietor possesses this power.

In addition, our memorandum proved that the Port Authority's ban did not conflict with any international treaty or executive agreement to which the United States is a party. As a matter of fact, both the State Department and Secretary Coleman have concurred in our interpretation of these treaties and agreements as well as in our conclusion that the only constraints upon the Port Authority's power to refuse permission for Concorde flights at JFK relate to matters which Air France and British Airways have chosen not to raise in their moving papers, *viz.*, possible issues involving discriminatory regulations and burdens on interstate or foreign commerce.

Finally, our memorandum conclusively showed that the Port Authority's temporary ban does not invalidly interfere with the authority of the Federal Government to conduct foreign relations. Rather, it demonstrated that the Federal Government, in negotiating with foreign powers concerning air commerce, including Concorde operations in the United States, has always been careful to preserve, and not contract away, the rights possessed by airport proprietors under domestic law.

Our second memorandum to the Court below, entitled "Defendant's Supplemental Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment," which is likewise attached hereto in its entirety (pp. II-1 to II-3), advised the Court that on November 18, 1976 Secretary Coleman released the Federal Government's long-awaited

Airport Noise Abatement Policy statement and that this statement served only to confirm the position taken in our earlier memorandum, to wit, that airport proprietors can, under existing Federal law, ban noisy aircraft from the use of their facilities.

Our final submission on the merits to the Court below was a post argument memorandum which is also attached hereto in its entirety (pp. III-1 to III-21). This memorandum dealt with the principal matters which arose during oral argument on April 28, 1977, including a point that the Court had raised *sua sponte*—the relevance to this litigation of 49 U.S.C. §1353 (b) and *Coxsey* v. *Hallaby,* 231 F. Supp. 978 (W.D. Okla. 1964). The memorandum showed, we believe, that §1353 (b) and the *Coxsey* decision were totally inapplicable to this litigation.

Our post-argument memorandum further pointed out that Ambassador Alan Boyd, who is currently representing the United States in its negotiations with the United Kingdom concerning the Bermuda Agreement, the executive agreement upon which the airlines place heavy reliance, has recently advised Great Britain that the Port Authority's temporary ban on Concorde operations does not violate that agreement. In a briefing on the negotiations, Ambassador Boyd stated:

> "The position the United States takes is that any aircraft operated by a party to the agreement should be permitted to fly to and from the United States so long as it complies with laws and regulations and the position the United States has taken is that the laws and regulations are both state and local and that it is a matter of domestic law and interpretation of domestic law as to whether the Port of New York Authority has, in fact, the power to issue noise regulations and [to] as a result of those noise regulations ban the use of any type of aircraft." (Joint Appendix, Appendix III-H, p. III-57a).

Finally, our post-argument memorandum demonstrated that the legislative history of the 1968 Noise Abatement Amendment to the Federal Aviation Act and its contemporary construction show a clear Congressional intent that there is no conflict between Federal regulations that permit given aircraft types to operate at United States airports and an airport proprietor's restriction that reasonably keeps such types out.

On May 11, 1977 the District Court rendered its decision in a 31-page opinion by Judge Pollack holding that the Port Authority's temporary ban on Concorde flights at JFK was in direct conflict with the February 4, 1976 decision of Secretary Coleman authorizing such flights and was therefore invalid under the Constitution's supremacy clause. More specifically, Judge Pollack ruled that

> "The PA Resolution in effect nullifying the permits to the air carriers based on a purpose of PA to re-review the noise criteria applicable to the use of the Concorde at JFK is in irreconcilable conflict with the federal examination of the question and the further orders thereon of the PA resolution must give way under the Supremacy Clause in the Constitution." (Joint Appendix, p. 179a).

With all due deference to the Court below but without exaggeration, we respectfully submit that Judge Pollack's decision is demonstrably wrong and therefore the final point of our submission to this Court (Supplemental Brief, pp. IV-1 to IV-10) shows, contrary to Judge Pollack's holding, that Secretary Coleman's decision does not order, does not purport to order, and cannot be read as ordering Concorde operations at JFK without Port Authority permission. Our argument here proves, we believe, that there is no conflict whatsoever between the Port Authority's temporary ban on Concorde flights and Secretary Coleman's decision. Indeed, Secretary Coleman's decision itself ac-

knowledges that Air France and British Airways must comply with the Port Authority's noise regulations. Thus, the very first appendix to the Secretary's February 4, 1976 decision declares in unmistakable language:

> "The other major concern about safety that is within the FAA's jurisdiction is the ability of the Concorde to execute the left turn off of Runway 31 Left at JFK, *which will be necessary to comply with the Port Authority's noise regulations.*" (Joint Appendix, p. 115a, emphasis added).

This statement accords with Secretary Coleman's position when he announced, on November 13, 1975, the public hearing that led to his February 4, 1976 Concorde decision. In releasing his notice of the public hearing, he stated in words too clear to be misunderstood:

> "today I have released a copy of the Environmental Impact Statement on the applications of Air France and British Airways for amendment of their operations specifications. If granted, the amendments would authorize the carriers to operate Concorde Supersonic Aircraft in limited commercial service to New York and Washington *provided the airport operators agree.*" (Addendum, emphasis added).

Furthermore, in numerous statements made after his February 4, 1976 Concorde decision, the former Secretary, as well as the present Secretary, Brock Adams, have asserted that the February 4th decision was merely a granting of the necessary Federal permission for Concorde flights and did not obviate the necessity of also obtaining permission for such flights from the Port Authority, the proprietor of JFK. And, as we shall show in our Supplemental Argument to this Court, pp. IV-1 through IV-10, under well established law, an administrator's interpretation of his own order is entitled to great deference and is controlling unless clearly erroneous.

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

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*Defendants.*

## DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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# United States District Court

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*Defendants.*

## DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

### Statement

This memorandum is submitted by the Port Authority defendants in opposition to the motion by Air France and British Airways for summary judgment in their suit to invalidate the Authority's temporary ban on Concorde operations at John F. Kennedy International Airport. The memorandum shows that the ban does not, as plaintiffs claim, violate treaty or international agreements between the United States and the French Republic or between the United States and the United Kingdom or invalidly interfere with the Federal Government's authority to conduct foreign relations. The memorandum also shows that Congress' intent in the field of air commerce regulation was not to preempt, but rather to preserve, the right of airport proprietors to impose non-discriminatory restrictions on the aircraft users of their air terminals like the temporary ban here at issue. The memorandum thus demonstrates that the Port Authority's action is completely consistent with applicable Federal law—whether statutory, treaty or

otherwise—and, therefore, is perfectly valid and enforceable.

Whatever the legal situation may be in the unitary nations of France and Great Britain,[1] the division of governmental responsibility for the regulation of air commerce in our Federal system is clear. Pursuant to Congressional legislation, the Federal Government maintains exclusive control over the nation's airways and over the flight of aircraft in and through those airways. These subjects are not involved here but as to them the police powers of our State and local governments have been preempted.

Of controlling importance for present purposes is the fact that Congress has deliberately left all matters pertaining to the ownership, control and development of our nationwide system of civil airports to the States and to their political subdivisions. As a consequence, these units of government, in their role as airport proprietors, are responsible for the acquisition of whatever avigation easements are required by the low level flights of noisy aircraft and they are liable for whatever damages these aircraft inflict upon property owners in the course of landing and takeoff maneuvers. Accordingly, the report of the Senate Committee on the 1968 law, which for the first time empowered the FAA to certificate aircraft on the basis of noise considerations, quoted with approval a letter submitted by the Secretary of Transportation:

> "'Just as an airport owner is responsible for deciding how long the runways will be, so is the owner re-

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[1] For example, Concorde flights at London's Heathrow Airport are made possible only by a specific exemption from the normally applicable airport noise regulations which the Secretary of State for Trade has granted to this aircraft. 903 PARLIAMENTARY DEBATES, House of Commons, 236, 578-9 (January 1976) (Written Answers). In effect, what British Airways is seeking from this Court is the same special treatment that the Concorde is presently receiving at home.

sponsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" S. Rep. No. 1353, 90th Cong., 2d Sess. at p. 7 (1968). See Appendix A* submitted with this memorandum.

This is the current law and there is nothing in plaintiffs' memorandum showing the contrary. Indeed, a July 13, 1976 decision by a Federal District Court in California—a decision directly in point—upheld an airport proprietor's noise restrictions on the ground that "amendments to the Federal Aviation Act were not designed to and would not 'prevent airport proprietors from excluding any aircraft on the basis of noise considerations'."[2] Not only has the Federal judiciary upheld airport proprietors' noise restrictions but the responsible Federal administrative officials concur, as evidenced by Secretary of Transportation Coleman's decision on the Concorde's admission into the United States. Furthermore, this view is consistent with the letters which President Nixon wrote to the President of France

[2] *National Aviation, et al.* v. *City of Hayward,* —— F. Supp.——, No. C-75-2279. (N.D. Cal. July 13, 1976), at p. 14 of slip opinion. See Appendix B,** p. 18a.

*Renumbered Appendix I-A before the Second Circuit.

**Renumbered Appendix I-B before the Second Circuit.

and to the Prime Minister of Great Britain relating to the Concorde. (See page 62, below.)

Plaintiffs are demonstrably wrong when they assert that the Port Authority's temporary ban on "Concorde Flights Collides Squarely With The Secretary's Decision." Plaintiffs' Memorandum p. 41. What Secretary Coleman decided was to grant whatever Federal authorizations were required for the Concorde to fly into JFK. He nowhere purported to order or require such flights. With full knowledge of the Port Authority's temporary ban, he acquiesced in it, even if unhappily, stating that under present Federal policy an airport proprietor possesses this power. We will demonstrate that under current Federal law—as well as under current Federal policy—an airport proprietor possesses the power the Port Authority has here asserted.

## Statement of Facts

The defendant Port Authority of New York and New Jersey, formerly the Port of New York Authority, is an agency of both States created by an interstate compact between them to which Congress has given its consent. Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174 (1921).[3] The Authority, pursuant to the 1921 compact and subsequently enacted bi-State legislation, operates various terminal, transportation and other facilities of commerce in the New York-New Jersey metropolitan region, including the area's three commercial airports, John F. Kennedy International Airport (JFK), Newark International Airport and La Guardia Airport.

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[3] The fact that the Port Authority was created by an interstate compact to which Congress consented does not, of course, make it any less an agency of State government or turn it, in some way, into a Federal instrumentality. See *Tobin* v. *United States*, 306 F. 2d 270 (D. C. Cir. 1962) *cert. denied*, 371 U.S. 902 (1962); and *Shamberg* v. *Commissioner of Internal Revenue*, 144 F. 2d 998 (2d Cir., 1944), *cert. denied*, 323 U.S. 792 (1945).

**A. The Port Authority's restrictions on the noise of subsonic jet aircraft.**

The noise restrictions which the Port Authority has imposed on the use of its air terminals by subsonic jet aircraft have long been a matter of public record. On many different occasions they have been officially brought to the attention of each of the three branches of the Federal Government including the judiciary and the relevant Congressional committees. For example, in September, 1959, about a year after subsonic jet aircraft first began scheduled commercial operations, the Port Authority's then Director of Aviation, John R. Wiley, made the following statement before the Subcommittee on Transportation and Aeronautics and the Subcommittee on Health and Safety of the House of Representatives' Committee on Interstate and Foreign Commerce:

> "In 1951, when the present commercial jet aircraft were still being designed, the port authority board of commissioners adopted a regulation that is still in force which states, 'No jet or turboprop aircraft may land or take off at an air terminal without permission.' The regulation was deemed necessary on the basis of the noise history of military jets, both bombers and fighters.
>
> "The following year the port authority made a statement which called public attention to the jet noise problem. In September, 1952 the then chairman of the port authority . . . speaking at the dedication of this [the JFK] control tower, looking ahead toward the jets that were then still on the drawing boards, said:
>
> > 'It would be just as useless to design planes that cannot be operated into and out of metropolitan airports because of excessive noise or performance characteristics as it would be to design planes that cannot fly. Aircraft manufacturers have solved the problems which related to safety, efficiency, and

speed of their planes. They must and they will solve these new challenges.'

"When this statement was made . . . the airlines had not even ordered jets. But the noise of piston engine planes had caused complaints from airport neighbors and there was reason to believe that jets would be noisier. The port authority therefore, continued its attempts to enlist the cooperation of the airlines and manufacturers in coping with the noise problem.

• • •

"The port authority's policy regarding the use of its airports by jets attracted worldwide attention when the De Havilland Aircraft Co. requested permission for use of New York International Airport [JFK] by one of the early unsuppressed models of the Comet aircraft, which was making its first visit to this country. The port authority refused such permission because of the exterior noise level of the aircraft. This refusal, incidentally, was attacked in the British press as an indication of the port authority's bias against British jets in favor of American jets.

"Not long afterward, Boeing requested permission to come into New York International Airport [JFK] with the unsuppressed prototype of its jet transport, which was making its first transcontinental trip. This permission was also refused.

"The port authority's policy received considerable public attention again in October of 1955 when Pan American announced the first order for commercial jet aircraft. At that time the then chairman of the port authority, Donald V. Lowe, issued the following statement:

'The port authority assumes that Pan American would require from the manufacturers specifications which would assure that these aircraft could oper-

ate to and from New York International Airport [JFK] without excessive noise characteristics that would be intolerable to the airport's neighbors. If Pan American has such assurances, the port authority, of course, is delighted that this airline has been able to effect this forward step in the progress of air transportation.'

"Mr. Lowe then reiterated the stand which the port authority had taken in 1951 and in 1952 and said, 'The port authority's position has not changed.'

"At the same time, the port authority began preparing to cope with the jet-age problem. To this end, the port authority retained the outstanding acoustical engineering firm of Bolt, Beranek & Newman of Cambridge, Mass. The consultants were assigned the task of devising methods of measuring and evaluating aircraft noise so that when the airlines sought permission to use jets at New York International Airport [JFK], the port authority would have a sound scientific basis for its decision.

"By this time, the port authority's stand, and similar stands taken by other airport operators elsewhere in the world, began to have some effect. The airlines began to require of the manufacturers who were building their aircraft that something be done to eliminate some of the noise at the source. Boeing and Douglas launched extensive research programs in this country and similar programs were launched in England to develop suppressors for jet engines so as to cut down their external noise output.

"The port authority cannot take sole credit for this development. But it is a fact that our unwavering stand from 1951 on helped to bring about the practical interest in this problem which led to the development of noise suppressors. The suppressors on the Boeing 707, for example, according to Boeing, represent an

investment of well over $10 million in research, development, and testing. Similar investments have been and are being made by Douglas Aircraft Co., Convair, Lockheed, and De Havilland. They also represent large expenditures by the airlines which must pay for and operate them.

• • •

"The culmination of the port authority's work on this problem is the findings which its consultants have made of the noise characteristics of the Boeing 707 and the Comet IV as compared to conventional propeller-driven aircraft. These technical reports are published in separate booklets which are each 375 pages long and which are complete with charts, graphs, tables, and diagrams. They are highly technical but they reduce noise to a meaningful measure; that is, they present a method for analyzing the noise characteristics of these aircraft as heard by the people in the communities adjacent to the airport.

• • •

"This new concept of noise measurement meant that a jetplane, in order to be rated as equal to a piston-engine plane in perceived noise decibels, or human rating, would actually have to be a number of decibels lower in its actual noise output than the piston-engine aircraft.

"The reports on the Comet IV and the Boeing 707 established that these jet aircraft could be operated at the airport under certain conditions and still be tolerable to the communities around the airport. It then became necessary for our engineers, in conjunction with airline operation people and acoustical experts, to determine conditions for the use of our airports by jets which would keep their noise level as heard in the communities down to a tolerable level.

"Thereafter, Pan American Airways requested permission to operate the Boeing 707 at New York In-

ternational Airport [JFK] on a provisional basis. Its request set forth conditions relating to the use at the airport by its jet aircraft intended to minimize the effects of noise. Both the Boeing 707 and the Comet IV performed trial flights to and from New York International Airport [JFK] under these controlled conditions, with port authority representatives closely monitoring the flights. The procedures first suggested by Pan American served as the basis for the conditions under which the port authority granted permission to Pan American and BOAC [the predecessor of plaintiff British Airways Board] for the regularly scheduled operations of the Boeing 707-120 and the Comet IV, respectively, at New York International Airport [JFK] beginning October 4, 1958. Last week, permission was granted to United and Delta for DC-8 operations subject to observance of similar conditions.

"The conditions under which the port authority permits these jets to operate at New York International Airport [JFK] include a mandatory runway use procedure that requires that jet aircraft use runway 25 or runway 22, for overwater takeoffs whenever wind and other conditions permit. When it is not possible to take off over water, then and only then, takeoffs are permitted on runway 13-R, 31-L, or 7, but only on the condition that they be so planned and conducted that their noise level will not exceed 112 perceived noise decibels. In addition, takeoffs involving flights over communities are limited to the hours between 7 a.m. and 10 p.m. Takeoffs at night are permitted only over water on runways 22 and 25." *Hearings on Aircraft Noise Problems conducted by the Subcommittees on Transportation and Aeronautics, and Health and Safety of the House Committee on Interstate and Foreign Commerce, 86th and 87th Cong., at 5-8 (1959).*

The Port Authority has consistently enforced its noise restrictions on the use of subsonic jet aircraft at its air

terminals. Thus, John E. Stephen, General Counsel for the Air Transport Association of America, informed the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on November 21, 1967 when it was considering what would become the 1968 noise abatement amendment to the Federal Aviation Act of 1958:

> "The cost of complying with that [the Port Authority's] local regulation, for instance has been estimated, in the case of one airline alone at Kennedy International Airport, at over $4 million a year.
>
> "Another airline estimates that its cost of complying with the Kennedy 112-PNdB regulation amounts to 5 percent of its annual gross operating revenue for each affected aircraft at that airport.
>
> "Until now, the New York port regulation has been upheld by the courts largely because of omission by the Federal Government to exercise Federal authority." *Hearings on H.R. 3400 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st and 2nd Sess. at 91 (1967).*

The impact of the Port Authority's subsonic jet noise restrictions was also recently acknowledged by Secretary of Transportation, William T. Coleman, Jr., in testimony before the Subcommittee on Aviation of the House Committee on Public Works and Transportation. Mr. Coleman was asked "under what circumstances have local airport proprietors refused landing rights [to aircraft] at U.S. airports?" He responded:

> "I think that somebody said that at one time, with respect to an airplane that the British had, for a time JFK denied landing rights. My checking, which is not complete, . . . I think that those rights were eventually permitted, and the Aircraft was permitted to land.

"Mr. Anderson: Could you clarify that for the record?

"Mr. Coleman: Yes, sir; I will.

[The following was received for the record:]

"Prior to admitting jets to Idlewild (now JFK), LaGuardia and Newark Airports in 1957, the Port Authority of New York and New Jersey required noise tests for each aircraft type. Acceptable noise levels were set at essentially what the DC-6B would do—about 112 PNdB. The French Caravelle (2 engines) passed the test, while the 707 and British Comet (4 engines) failed until noise suppressors were installed on the engines and power cutback procedures were instituted on take-off." *Hearings on Current and Proposed Federal Policy on the Abatement of Aircraft Noise conducted by the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 94th Cong., 1st and 2d Sess. at 671 (1975-76), (hereinafter referred to as Aircraft Noise Policy Hearings).*

**B. The Port Authority's temporary ban on Concorde operations at John F. Kennedy International Airport**

On March 11, 1976 the Port Authority's Board of Commissioners adopted the temporary ban on Concorde operations at JFK here being challenged. After first reviewing the Port Authority's restrictions on the noise of subsonic jet aircraft, described above, the minutes of the March 11th meeting continue as follows:

"The Executive Director reviewed with the Board both the Federal Aviation Administration's final environmental impact statement relating to the request by British Airways and Air France for an amendment to their operations specifications to permit these carriers to fly the supersonic Concorde aircraft in limited commercial service at Kennedy International

and Dulles International Airports and the February 4, 1976 decision of the Secretary of Transportation of the United States, William T. Coleman, Jr., directing the FAA to issue provisional amendments to such operations specifications. The restrictive amendments, which the Secretary justified on the basis of the Concorde's significantly different environmental characteristics, will permit each airline to conduct during daylight hours up to two Concorde flights per day into Kennedy and one Concorde flight per day into Dulles, for a period of no longer than 16 months from the commencement of commercial service, subject to revocation at any time upon four months' notice or immediately in the event of an emergency being harmful to the health, welfare or safety of the American people.

"At the direction of the Governor of New York, New York State's Commissioners of Transportation and Environmental Protection, Raymond Schuler and Ogden Reid, appeared before the February 25, 1976 meeting of the Operations Committee to express in detail the State's reasons for recommending that the Concorde be denied permission to use Kennedy International Airport. Excessive noise was identified by them as the principal objection to the Concorde. In addition, the Legislature of the State of New York has passed and the Governor has signed, proposed legislation that would mandate the Port Authority to deny permission to such aircraft to use Kennedy International Airport. Concurrent proposed legislation is pending in New Jersey.[4]

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[4] As of this date, August 17, 1976, New Jersey has not passed concurrent legislation. On May 13, 1976, Judge Foley of the Northern District of New York held that the New York statute was inoperative in the absence of concurrently enacted New Jersey legislation. *Brown* v. *Carey*, —— F. Supp. ——, No. 76-CV-103, (N.D. N.Y. 1976).

"Although it is claimed that the Concorde would meet the Port Authority's 112 PNdB standard by executing a low altitude turn shortly after take-off, the environmental impact statement and the Secretary's decision raise a number of significant questions concerning the effect of low frequency noise and vibrations generated by the Concorde and the airplane's overall impact on the noise environment in the area surrounding Kennedy. As Secretary Coleman points out, the Concorde's individual noise events will disturb more airport neighbors than the comparable range subsonic aircraft. The area exposed by the Concorde's take-off noise levels will be 47.6 square miles, approximately 6 times that exposed by the Boeing-707 and 15 times that by the Boeing-747. On landing, the area exposed by the Concorde, 11.1 square miles, will be approximately 5 times that exposed by the Boeing-707 and 20 times that by the Boeing-747. In addition, the Concorde engines generate low frequency energy and, consequently, induce higher levels of noise and structural vibrations in homes and other structures than do subsonic aircraft. The unique noise characteristics of the Concorde and the expected aggravated community response to this noise add new and serious dimensions to the present aircraft noise problem, one not necessarily reflected in the Port Authority's current noise standard.

"Secretary Coleman has therefore concluded that the subjective characteristics of noise response to the Concorde 'may best be evaluated through a controlled demonstration period of sufficient length to enable an assessment, after the initial publicity has subsided, of community reaction to Concorde noise.' He has therefore directed the FAA, the proprietor of Dulles International Airport, to permit the Concorde to operate at that airport. At Dulles, a facility double the size of Kennedy, less than 1,000 residents will be included within the noise exposure forecast 30 noise impact

contour and none within the NEF 40 severe noise impact area. However, according to the environmental impact statement there are 485,000 persons within the NEF 30 contour at Kennedy and 112,000 within the NEF 40 contour. It does not appear to be in the public interest to test the subjective characteristics of noise response to the Concorde in the densely populated areas around Kennedy International Airport. In this regard it was noted that the Secretary had expressed the opinion that the elimination of Kennedy International Airport 'would greatly diminish, but . . . would not destroy, the validity of the demonstration.' It is clear from the foregoing that a test at Dulles is clearly preferable as the actual performance and environmental results could be monitored without impacting so large a residental population. It is accordingly recommended that the Port Authority defer any action to permit supersonic aircraft, including the Concorde, from operating at Port Authority air terminals for a period not to exceed 6 months following the commencement of regular commercial operation of the Concorde at Dulles Airport.

"It is further recommended that the Director of Aviation analyze the Concorde flights at Dulles, Heathrow and DeGaulle Airports and the communities' reaction thereto, and study the results of the Department of Transportation's mandated monitoring program for such 6 month period, and, if necessary, request the FAA to modify its program in order to provide the Port Authority with required data, or otherwise secure data, which would enable the Port Authority to apply this information to communities surrounding Kennedy International Airport.

"In addition, the liability of the Port Authority for any claims for damages arising out of the Federally mandated operation of such aircraft requires a most thorough-going review and it is directed that General

Counsel proceed to research and study the questio to contact the appropriate Federal agencies for pos sible liability coverage and to assess the airline operator's responsibility as well.

"Whereupon, the following resolution was unanimously adopted:

"RESOLVED, that the Port Authority deny permission to operate any supersonic aircraft, including the Concorde, at Kennedy International Airport, until after at least six months of operating experience has been evaluated, after a report on such experience has been made to the Board and pending further action thereon by the Board; and it is further

"RESOLVED, that the Director of Aviation is directed to analyze Concorde flights for a period of six months at Dulles International Airport and also at Heathrow and DeGaulle Airports, the community reaction thereto, the results of the Department of Transportation mandated monitoring program at Dulles, and, if necessary, request the Federal Aviation Administration to modify such program, or otherwise to secure additional information concerning the Concorde's noise and other environmental characteristics; and it is further

"RESOLVED, that the Executive Director be and he hereby is authorized to retain such number of consultants in connection with the foregoing study as he may deem advisable; and it is further

"RESOLVED, that the Executive Director and the Director of Aviation be and they hereby are directed, at the end of the foregoing six month program, based upon analysis of noise data and community reaction thereto, to make a recommendation to the Commissioners as to the acceptability of supersonic operations at Kennedy International Airport."

**C. Air France and British Airways sue to upset the Port Authority's temporary ban on Concorde operations.**

On March 17, 1976, Air France and British Airways instituted this suit to invalidate the Port Authority's action in temporarily banning Concorde operations at JFK. The two airlines claim that this action invades an area preempted by the Federal Government and violates international commitments made by the United States to the British and French Governments. On April 6, 1976, the Port Authority defendants answered the airlines' complaint and on July 12, 1976, the airline plaintiffs moved for summary judgment. We agree with the airlines that no triable factual issue exists which is material to the disposition of this action. Plaintiffs' Memorandum, p. 13. Accordingly, the action is ripe for summary judgment.

## ARGUMENT

**The Port Authority's temporary ban on Concorde operations at John F. Kennedy International Airport is valid and enforceable.**

## POINT I

**Congress' unmistakable intent in the field of air commerce regulation was not to preempt, but rather to reaffirm, the right of airport proprietors to impose non-discriminatory restrictions on aircraft users like the temporary ban here at issue.**

We shall here show the erroneous nature of plaintiffs' argument that the Port Authority's temporary ban on Concorde operations "interferes with a comprehensive national scheme of regulation . . . established pursuant to federal authority under the Commerce Clause. . . ." Airline Memo, p. 32. While it is true, as plaintiffs assert, that Concorde operations at JFK have been *authorized* by Fed-

eral law, they are not *required* by such law because, as we shall now demonstrate, Federal law has carefully preserved to an airport proprietor the right to exclude such operations if it so desires.[5]

**A. The place of the commercial airport in the civil aviation system of the United States and the *Griggs* decision.**

The Air Commerce Act of 1926, 44 Stat. 568, the first Congressional legislation on this subject, set the pattern for all future regulation of air commerce. It placed upon the Federal Government responsibility for the establishment of civil airways granting a public right of freedom of transit through them, but left to local government the development of airports. Thus, §5 (a) prohibited the use of Federal monies "for the purchase or establishment of airports" and provided that "established airports . . . may be transferred to . . . the municipalities concerned . . ." Section 5 (b) authorized the Secretary of Commerce "to . . . establish civil airways" and to "maintain along such airways all necessary air navigation facilities *except airports.*" (Emphasis added).

In enacting this legislation, Congress relied upon the report of a special committee of the National Advisory Committee for Aeronautics which stated:

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[5] Except for their reliance on international agreements, plaintiffs' entire case rests upon the Commerce Clause of the Constitution:

> "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several states. . . ." Art. I, § 8, Cl. 3.

The leading modern Supreme Court interpretation of this clause is found in Chief Justice Stone's opinion in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945), where he said:

> "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible [citations] or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce [citations]."

> "The policy of the Federal Government regarding airports and the encouragement of air navigation should be analogous to its policy regarding seaports and the encouragement of water navigation. In the latter field the Government makes charts, establishes and maintains lighthouses, dredges channels, furnishes weather forecasts and storm warnings, and provides for inspection and licensing, but leaves to municipal authorities the control of port facilities. In aid of air navigation the Federal Government should chart airways, establish markers, including lights for night flying, establish and maintain emergency landing fields, furnish weather report service, and provide for inspection and licensing, *but leave to municipal authorities the control of airports.*" (Emphasis added) Twelfth Annual Report of the National Advisory Committee for Aeronautics (1926) p. 10.[6]

Furthermore the committee pointed out that if the Federal Government were to assume control of airports local initiative would be destroyed.[7]

A second Federal statute, the Civil Aeronautics Act of 1938, 52 Stat. 973, continued in §302(a) the ban on Federal acquisition of airports but provided that the Civil Aeronautics Authority shall survey the existing airport system and recommend to Congress whether the Federal

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[6] The legislative history of the Air Commerce Act of 1926 is traced on pages 9 through 12 of this report, the pertinent provisions of which are attached to this memorandum as Appendix C.

[7] A 1928 decision described the division of governmental responsibility over air commerce by saying that (1) the "federal undertaking [is] to lay out and equip airways," which it defined as "essentially a free highway . . . open to all qualified aircraft" and (2) the "maintenance of airports . . . comes legitimately within the scope of the municipality in much the same manner as docks and harbor facilities for marine shipping. . . ." *City of Wichita* v. *Clapp*, 125 Kan. 100, 105, 263 P. 12, 15 (1928).

Government should participate in its development. In March, 1939, the CAA recommended to Congress that "an adequate system of airports . . . should be recognized in principle as a matter of national concern", House Doc. 245, 76th Cong. 1st Sess., p. 129, thus justifying Federal grants-in-aid to local government for airport purposes.

Legislative realization of the CAA's recommendation had, however, to await the conclusion of World War II when Congress passed the Federal Airport Act of 1946, 60 Stat. 170. This Act, while affirming the Federal interest in "the establishment of a Nation-wide system of public airports adequate to meet the present and future needs of civil aeronautics", §4, and thus warranting Federal grants-in-aid to public agencies for airport development, nevertheless, left with State and local government the responsibility for establishing and developing air terminals. The two most recently enacted Federal-aid-to-airports statutes, the Airport and Airway Development Act of 1970, 84 Stat. 219, and its 1976 amendments, P.L. 94-353, have not changed the jurisdictional framework of the earlier legislation.

It was on the basis of this statutory framework that the United States Supreme Court rendered its landmark decision in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). That case held that if, as the result of low altitude flights of commercial aircraft operating from a publicly-owned airport, an air easement is "taken" over nearby property, within the meaning of the Constitution, it is the airport proprietor, rather than the aircraft operator or the United States, who is the financially responsible party. Justice Douglas, writing for the Court, specifically took note of the airport proprietor's argument that "though there was a 'taking' someone other than respondent [the airport proprietor] was the taker—the airlines or the C.A.A. acting as an authorized representative of the United States." 369 U.S. at 89. He categorically rejected this contention, pointing out that the airport proprietor

"was the promoter, owner, and lessor of the airport, [and] was in these circumstances the one who took the air easement in the constitutional sense." 369 U.S. at 89.

Justice Douglas went on to say that the airport proprietor

"decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan. For, as we have already noted, Congress provided in 49 USC §1109 for the payment to the owners of airports, whose plans were approved by the Administrator, of a share of 'the allowable project costs,' including the 'costs of acquiring land or interests therein or easements through or other interests in air space.' §1112(a)(2). A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?" 369 U.S. at 89-90.

Even before the *Griggs* decision, numerous so-called "inverse condemnation" suits were brought alleging that the noise of low flying aircraft engaged in take-off and landing operations had resulted in "takings" of property without compensation in violation of constitutional re-

quirements. What *Griggs* did, as we have seen, was to hold, as a matter of Federal constitutional doctrine, that the airport proprietor was the financially responsible party for whatever "takings" might occur.[8] The earlier decision in *United States* v. *Causby,* 328 U.S. 256 (1946), was the first case to hold that noisy low altitude flights could amount to a "taking" of property, and, of course, following *Griggs,* these inverse condemnation claims have almost universally been brought against the airport pro-

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[8] In holding the airport proprietor rather than the Federal Government liable for the "taking," the Supreme Court in *Griggs* ignored the strong—and in our view persuasive—argument advanced by the Airport Operators Council (AOC), appearing *amicus curiae.* AOC pointed out that the then recently enacted Federal Aviation Act of 1958 reiterated in §104 the existence of "a public right of freedom of transit through the navigable airspace of the United States," found in the earlier Civil Aeronautics Act of 1938, but, unlike the earlier act, the 1958 statute expressly declared that:

> " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, *and shall include airspace needed to insure safety in take-off and landing of aircraft.*" §101(26) (Emphasis added)

Accordingly, AOC indicated that if a "taking" had occurred, it should not be the airport proprietor but rather the Federal Government which should be the financially responsible party, since the Government and not the proprietor had conferred "a public right of freedom of transit" in the airspace in question.

Not only do we believe that *Griggs* was wrongly decided as a matter of technical law, but we believe that its result was undesirable in terms of sound public policy since it placed the financial burden of aircraft noise on the one segment of the aviation community that could do least about it. Nevertheless, until Congress or the Supreme Court overturns *Griggs,* it represents the existing law. Obviously, airport proprietors must live with its holding and we submit that an inevitable corollary to its holding must be that they possess the power to protect themselves from liability to nearby property owners by having the right to restrict the type of aircraft that can use their facilities. Acceptance of plaintiffs' position here would create an impossible situation for airport proprietors, since in certain instances only by restricting aircraft use at their facilities can they avoid monetary liability to aggrieved property owners.

prietors. See, for example, *Aaron* v. *City of Los Angeles,* 40 Cal. App. 3d 471 (1974), *cert. denied,* 419 U.S. 1122 (1975); *Adams* v. *County of Dade,* No. 72-1021 (Fla. Cir. Ct., Dade County, April 9, 1975); *Parker* v. *City of Los Angeles,* 44 Cal. App. 3d 556 (1974); *Alevizos* v. *Metropolitan Airport Commission of Minnesota & St. Paul,* 298 Minn. 471, 216 N.W. 2d 651 (1974); *Drennen* v. *County of Ventura,* 38 Cal. App. 3d 84 (1974); *City of San Jose* v. *Superior Court of Santa Clara County,* 12 Cal. 3d 447, 115 Cal. Rptr. 797 (1974); *Martin* v. *Port of Seattle,* 64 Wash. 2d 309, 391 P. 2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965); *Thornburg* v. *Port of Portland,* 233 Ore. 178, 376 P. 2d 100 (1962); *Thornburg* v. *Port of Portland,* 244 Ore. 69, 415 P. 2d 750 (1966).

The effect of the *Griggs* and *Causby* decisions on airport proprietors is a matter of public record. For example, in testimony before the Subcommittee on Aviation of the House Committee on Public Works and Transportation given on January 29, 1976, Clifton A. Moore, General Manager of the Los Angeles Department of Airports, stated:

> "In California, and particularly in Los Angeles, we have had the problem that the courts have recognized the right of the owner to recover from the proprietor funds for the effects of aircraft noise over their property. Initially, we had multi-billion dollar class action suits, as well as individual suits filed on behalf of individual owners.
>
> "Mr. Anderson. What was the total of your suits?
>
> "Mr. Moore. At one time, as high as $3.5 billion.
>
> "Mr. Anderson. $3½ billion?
>
> "Mr. Moore. Yes.
>
> "The courts have struck down, for the time being at least, any class actions relative to recovery for

noise reasons. But they have found, and the Supreme Court has supported, the liability of the proprietor and the ability of owners to recover from the proprietor.

"We avoided at Los Angeles many of these suits by simply buying property within the city where we had the ability to do so, and in accomplishing that, spent $135 million and removed some 2,800 homeowners from their homes, which is a substantial operation. I would say it has been accomplished with a minimum of friction but, nevertheless, has caused a severe dislocation problem to individual families.

"Mr. Anderson. Is that $135 million basically in the area where you have developed parking lots?

"Mr. Moore. A very small part of it is parking lots. Most of it is still vacant. . . . I would estimate that approximately 12 percent is in parking." *Aircraft Noise Policy Hearings,* pp. 516-517

**B. Federal preemption of aircraft flight regulation and the Port Authority's restrictions on subsonic jet aircraft—the *Cedarhurst, Hempstead* and *Eastern Airlines* cases.**

In 1952 the Village of Cedarhurst, New York, which is located less than a mile from JFK, enacted an ordinance making it a crime for aircraft to fly over the Village at altitudes under 1,000 feet. The ordinance contained recitals declaring, *inter alia,* that low-level flights constitute "a public nuisance, a trespass and a menace to the inhabitants . . . and to their rights of property." The Port Authority, as proprietor of JFK, the Authority's airline tenants and the Airline Pilots Association sued to enjoin enforcement of the ordinance. *Allegheny Airlines, et al., Port of New York Authority, et al.* v. *Village of Cedarhurst, et al.,* 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd,* 238 F. 2d 812 (2d Cir. 1956). Both the District Court and the Court of Appeals ruled that the ordinance was unconstitutional on the ground

that it invaded a field of regulation—air traffic control—which Congress had preempted to the exclusion of conflicting legislation by the States and their agencies. In other words, local government could not keep aircraft from flying in the navigable airspace of the United States, since Congress, in the 1926 Air Commerce Act and the 1938 Civil Aeronautics Act, had granted "a public right of freedom of transit" through such airspace.

In 1963 the Town of Hempstead, which also adjoins JFK, attempted, like Cedarhurst, to use its police power to protect its citizens from noise disturbances by passing an ordinance prohibiting the operation of any mechanism or device, including aircraft, which created, within the town, noise in excess of certain specified limits. The same group of plaintiffs that had challenged the Cedarhurst ordinance again successfully sued. *American Airlines, et al., Port of New York Authority et al.* v. *Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). The District Court, in an opinion by Judge Dooling, invalidated the ordinance on three grounds: (a) as invading an area preempted by the Federal Government; (b) as conflicting with valid applicable Federal regulations; and (c) as constituting an undue burden on commerce. 272 F. Supp. 226, 234-236. On appeal, the Second Circuit upheld Judge Dooling's decision on the ground of conflict without reaching the questions of preemption and burden. 398 F.2d 369, 376, fn.4. The conflict, as found by both the Second Circuit and Judge Dooling, existed because the practical effect of the ordinance was to make it illegal for aircraft to fly in the navigable airspace of the United States through which Congress had conferred "a public right of freedom of transit."

In the course of his opinion, Judge Dooling referred to *Port of New York Authority* v. *Eastern Airlines*, 259 F. Supp. 745 (E.D.N.Y. 1966), which until last month's *Hayward* decision, discussed below, was the only case involving

a direct airline challenge to an airport proprietor's right to impose noise restrictions on its aircraft users. The precise issue was the Port Authority's right to prohibit jet aircraft from using a recently completed runway at La-Guardia Airport until construction of a second runway was also completed. The Authority wanted to avoid the concentration of jet noise which would have resulted from the use of the one runway alone. The court, in an opinion by Judge Bartels, held, first, that the Authority's prohibition was reasonable; second, that it neither conflicted with, nor interfered with the FAA's ability to control air traffic; and finally, that the Authority was entitled to injunctive relief without specifically showing irreparable damage or loss.

On the question of Federal preemption, Judge Bartels stated:

> "It is unnecessary to decide in this case whether the FAA possesses the power and authority to pre-empt the area of regulating the use of the runways for purposes of air traffic control into and out of LaGuardia Airport. The issue here is whether the FAA has actually attempted to exercise such power and authority in opposition to the Port Authority's regulations and has thus frozen the area. Cf., *South Carolina State Highway Dep't* v. *Barnwell Bros.*, 1938, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 . . . [T]he letter of August 11, 1966 to the Port Authority from William F. McKee, Federal Aviation Administrator . . . states, among other things, that 'in making the runway available for the fullest use required by safety considerations we are not directing that the runway be used.' . . . One must conclude . . . that while the FAA believes that runway 4-22 can be safely used, it is not prepared at the present time to direct their use in the interest of safety or to pre-empt the regulation of its use in contradiction of Port Authority's rules and regulations. Buttressing this conclusion is the fact

that although fully advised of this proceeding . . . the FAA has made no effort to intervene. Cf., *Allegheny Airlines* v. *Village of Cedarhurst,* 2 Cir. 1956, 238 F.2d 812." 259 F. Supp. at 752-753.

Similarly here, although Secretary of Transportation Coleman has full knowledge of the Port Authority's temporary ban on Concorde operations, he is quite obviously acquiescing in it, having made no effort to upset it in this litigation or otherwise.

**C. The legislative history of the 1968 aircraft noise abatement amendment.**

The Federal Aviation Act of 1958, 72 Stat. 731, like the earlier 1926 and 1938 statutes, was silent on the subject of aircraft noise. The first Federal statute to deal specifically with this subject was the 1968 aircraft noise abatement amendment to the 1958 Act. It is found in §611 of the 1958 statute and provides that the FAA, after consultation with the Secretary of Transportation,

"shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . ." § 611, Federal Aviation Act; 49 U.S.C. § 1431(a).

Although the 1968 amendment does not contain any express provision concerning Federal preemption in the field of aircraft noise regulation, its legislative history specifically defined the nature and scope of that preemption. Thus, the Report of the Senate Commerce Committee on H.R. 3400, which became the 1968 amendment, quoting with approval from the Secretary of Transportation's letter, states in unequivocal language that:

" 'H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments

> will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'" S. Rep. No. 1353, 90th Cong., 2d Sess. at p. 6 (1968) (hereinafter cited as Senate Report).[9]

The conclusion follows a discussion of Judge Dooling's opinion in *Hempstead* which the Committee used to define the nature and scope of Federal preemption in this field:

> "'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines* v. *Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966).'" Senate Report, p. 6.

But of crucial significance to this litigation is the all-important fact that Congress did not intend entirely to prevent State and local governments from acting in this area. The Senate Report continues that:

> "'the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.'" Senate Report, p. 6.

The Senate Report, quoting from the Secretary of Transportation's letter gives the following rationale for continued participation by airport operators:

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[9] The pertinent portion of the Senate Report is submitted herewith as Appendix A.*

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*Renumbered Appendix I-A before the Second Circuit.

"'Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" Senate Report, p. 7.

In other words, the Senate Committee not only agreed with the Port Authority's contention[10] that there is a legal

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[10] Also included in the legislative history of the 1968 noise abatement amendment is a 1966 paper presented to a White House panel on the aircraft noise problem by the Port Authority's then General Counsel, Sidney Goldstein. Mr. Goldstein's paper, entitled "Comments on the Problem of Jet Noise" is submitted herewith. Mr. Goldstein stated that the Authority's noise restrictions

"are not based on police power considerations but rather upon the inherent right of a landowner to control, either by contract or otherwise, the activities of those who use his facilities —activities for which . . . the airport operator might be held liable to property owners in adjacent communities. It seems clear that the Port Authority possesses the power to require its airline tenants to refrain from using its facilities in such a way as to subject it to money damage claims brought by airport neighbors or otherwise to engage in activities that will prove detrimental to its good name or to that of its airports." Executive Office of the President, Office of Science

distinction between local police power ordinances of the *Cedarhurst* and *Hempstead* variety and an airport proprietor's restrictions but it was happy to do so for several reasons. First, the record shows that the Senate Committee was worried lest the expansion of the Federal Government's regulatory powers to include noise certification would affect its legal and financial liability, possibly leading to an overturning of *Griggs*.[11]

Second, the Committee acknowledged that an airport proprietor could control aircraft noise by making a determination not to expand or improve an existing airport for the purpose of accommodating noisier jets. In reaching such a decision it knew that the airport proprietor must balance noise costs against the need for air commerce. It further recognized that noise costs (additional land acquisition or avigation easements) could be minimized by airport restrictions designed to make the noisy jet more compatible with the neighboring community. Lastly, it faced up to the fact that attempts by airport operators to establish new jetports were increasingly blocked by citizen

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and Technology, A Report of the Jet Aircraft Noise Panel—Alleviation of Jet Aircraft Noise Near Airports, p. 136 (1966). This Report is part of the legislative history of the 1968 noise abatement amendment. See S. Rep. No. 1353, pp. 2, 10.

[11] At the Senate Hearing on H.R. 3400, Senator Monroney asked two related questions. The first was:

> "Will enactment of this legislation causing direct Federal involvement in the field of aircraft noise abatement and control increase the legal liability of the Federal Government for damage and damage claims caused by aircraft noise or sonic boom?"

And the second was:

> "Would this legislation to any degree preempt State and local government regulation of aircraft noise and sonic boom?"

*Hearing on* S. 707 and H.R. 3400, *Before Aviation Subcommittee of The Senate Committee on Commerce*, 90th Congress, 2nd Session, pp. 28-29 (1968), *(hereinafter cited as Senate Hearing.)*

concern over aircraft noise.[12] The Senate Committee therefore concluded that the growth of air commerce would be best served by giving specific sanction to the airport operator's right to restrict the use of its air terminals for noise abatement purposes.

**D. The contemporaneous construction of the 1968 aircraft noise abatement amendment.**

The preamble to the first regulation issued by the FAA under the 1968 amendment contains a thorough discussion of the scope of Federal preemption in the field of noise abatement. 14 C.F.R., Part 36:

> "Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels

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[12] *Senate Hearing*, p. 43. See also *American Airlines, et al., Port of New York Authority, et al.* v. *Town of Hempstead*, 272 F. Supp. 226, 228 (E.D.N.Y. 1966) and *Matter of Stoll* v. *Port of New York Authority*, 61 Misc. 2d 207, 208, 305 N.Y.S. 2d 17, 19 (Sup. Ct. 1969), *aff'd*, 32 A.D. 2d 892, 301 N.Y.S. 2d 943 (1st Dept. 1969), *motion for leave to appeal denied*, 25 N.Y. 2d 743, 306 N.Y.S. 2d 1025 (1969) where noise was undoubtedly the cause of some of the "political and social considerations" referred to by the court in explanation of why there thus far has not been a fourth jetport in the New York-northern New Jersey metropolitan area.

in any specific airport environment (see §§ 36.5 and 36.1581(a)).

* * *

". . . the FAA, in response to the *Griggs* decision . . . recognizes the right of State or local public agencies, as the proprietors of airports, to issue nondiscriminatory restrictions with respect to the permissible level of noise that can be created by aircraft using their airports." 34 Fed. Reg. 18355-18356 (November 18, 1969).

However, the preamble cautioned that the FAA:

". . . does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation controlling the flight of aircraft for noise purposes." *Id.* at 18356.

Even earlier the Acting FAA Administrator had given the very same construction to the 1968 amendment in denying a petition for rule making. *In re Dreifus,* FAA Regulatory Docket, No. 9071, July 10, 1969. The petition asked the FAA to adopt a rule prescribing time limitations for turbojet aircraft operating at Santa Monica, California, Municipal Airport similar to those imposed by that City's nighttime curfew ordinance which had been declared invalid by a state court decision.[13] The Administrator first pointed out that:

"The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adopting aircraft noise to the needs of local communities." *In re Dreifus,* FAA Regulatory Doc. No. 9071 (July 10, 1969). See Appendix D,* p. 42a.

He then addressed himself to the question of which level of government has the power so to regulate or restrict air-

[13] That decision was reversed on appeal and the right of the City of Santa Monica, proprietor of the airport, to impose a curfew was upheld. *Stagg v. The Municipal Court,* 2 Cal. App. 3d 318 (1969).

*Renumbered Appendix I-D before the Second Circuit.

craft operations. Based upon a complete review of the legislative history of the 1968 amendment, the Administrator concluded:

> "While States may not use their police power to regulate in any way flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *In re Dreifus, supra.* See Appendix D, p. 45a.

And with specific reference to supersonic civil aircraft like the Concorde, we point out that the FAA recognized the authority of an airport proprietor to regulate in this field when it issued its Advance Notice of Proposed Rulemaking (ANPRM) on Civil Supersonic Aircraft Noise Type Certification Standards which would involve amending 14 C.F.R., Part 36. 35 Fed. Reg. pp. 12555-56, August 6, 1970. The ANPRM specifically requested comments directed to the following question:

> "The development of methods to be applied to ensure that maximum use of the regulatory authority under § 611 is made, with respect to civil supersonic aircraft, without Federal interference with the right of States or local public agencies, as the proprietors of airports, to issue regulations or establish requirements as to the permissible level of noise which can be created by aircraft using their airports (see Senate Report 1353, pp. 6, 7)."

**E. The legislative history of the aircraft noise section of the 1972 Noise Control Act.**

The legislative history of the Noise Control Act of 1972, 86 Stat. 1234, only serves to reaffirm the fact that Congress intended to preempt State and local police power in the field of aircraft noise emissions but to permit regulation

by airport proprietors.[14] Section 7 of the 1972 Act, dealing with aircraft noise emissions, like the 1968 amendment (§ 611), contains no express preemption provision, but both the Senate and House Committees which considered the respective noise control bills included in their reports unequivocal statements that the bills would make no change in the existing preemption rule.

Thus, the House Report to accompany H.R. 11021, written with full knowledge of the legislative history and contemporaneous construction of the 1968 amendment (§ 611), states that:

> "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." House Report No. 92-842, 92nd Cong. 2d Sess., p. 10 (1972).

Senate Bill 3342, as reported out by the Senate Committee on Public Works, contained the following preemption section:

> "Sec. 506. No State or political subdivision thereof may adopt or attempt to enforce any standard respecting noise emissions from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part."

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[14] Section 7(b) of this Act amends the 1968 statute (§ 611) to require, *inter alia*, the Administrator of the Environmental Protection Agency to submit to the FAA proposed regulations which the Administrator determines are necessary to protect the public health and welfare. The Act combines provisions from House and Senate bills on this subject. The original version of H.R. 11021 was passed by the House on February 29, 1972 but was never concurred in by the Senate. 118 Cong. Rec. H. 6065 (Feb. 29, 1972). A Senate version, S. 3342, was passed by the Senate on October 13, 1972, but was never concurred in by the House. 118 Cong. Rec. S 35886 (Oct. 13, 1972).

The Report of the Senate Committee on Public Works on S.3342, as above amended, states in clear and unequivocal terms that:

> "States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibility or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." Senate Report No. 92-1160, 92 Cong. 2d Sess., pp. 10-11 (1972).

Senate S.3342 was subsequently changed by an amendment offered by Senator Tunney and therefore the final version, as passed by the Senate, but not the House, contained a new § 506 (renumbered § 505). The new § 505 which the Senate passed provided:

> "Sec. 505. No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof."

At the time he sponsored the amendment, Senator Tunney explained:

> "There was no intention in the committee bill to alter the relative power of the Federal Government, State and local government, and airport operator, over the control of aircraft noise. This amendment would also retain the same powers for all parties." 118 Cong. Rec. S. 35868 (Oct. 13, 1972).

As previously noted, although the Noise Control Act of 1972, which was finally passed, contains no express aircraft

noise preemption provision, Congress' obvious intent concerning preemption is crystal clear, to wit, there should be no change in the relative powers among (a) the Federal Government, (b) State and local governments, and (c) airport proprietors regarding the regulation of aircraft noise from that which existed prior to its adoption. Categorical declarations to this effect are contained in both the relevant Senate and House committee reports which we have just quoted. No contrary statement is to be found in the entire legislative history of the act.

**F. The most recent decisions—*Burbank, Crotti* and *Hayward.***

Less than a year after the passage of the 1972 Noise Control Act, the Supreme Court struck down a nighttime curfew imposed by the City of Burbank on jet operations at the Hollywood-Burbank Airport, a privately owned air terminal located within that city's jurisdiction. *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624 (1973). It ruled that all State and local police power regulation in the field of aircraft noise abatement had been preempted by Congress for exclusive control by the Federal Government. Its decision rested on two grounds: the pervasive nature of Federal regulation of aircraft contained in the Federal Aviation Act of 1958 as amended; and the legislative history of §611 of that Act as amended by the Noise Control Act of 1972.

The Court, however, made it clear that it was not passing upon the right of airport operators, when acting in their capacity as proprietors of the nation's air terminal system, to take action limiting aircraft noise. It quoted from that portion of the legislative history of §611, to which we previously referred, which disclosed a Congresional intent to permit airport proprietors to impose non-discriminatory restrictions on aircraft users. 411 U.S. at 635. It added by way of footnote:

> "The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation

> will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is non-discriminatory.' This portion as well was quoted with approval in the Senate Report. Ibid." (Emphasis the Court's). 411 U.S. at 635, footnote 14.

The same footnote went on to point out that the issue before the Court did not involve airport proprietors' rights:

> "Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. *Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.*" (Emphasis added). 411 U.S. at 635, footnote 14.

The question left open in *Burbank* was specifically passed upon by a three-judge District Court in *Air Transport Association* v. *Crotti,* 389 F. Supp. 58 (N.D. Cal. 1975). This case held, *inter alia,* that State legislation directing air-

port proprietors to take measures to reduce aircraft noise, including the curtailment of flight operations, did not violate the Constitution's Supremacy Clause. Accordingly, the contention of the present plaintiffs is wholly unfounded when they assert that *Crotti* held that:

> "noise control measures that could require the banning or restricting of certain flights . . . even when implemented by the proprietor of an airport, unlawfully invade the exclusive regulatory province preempted by the Federal Government's pervasive scheme of regulation of aircraft flight operations." (Plaintiffs' Memorandum, p. 39).

*Crotti* involved California's aircraft-airport noise abatement legislative program. In determining its validity, the court distinguished between those portions that were promulgated under the State's police power, which the court ruled were unconstitutional, and those which were based upon the State's proprietary interest in the airports operated by its political sub-divisions which the court upheld as not invading a field preempted by the Federal Government.

Thus, the court invalidated the so-called SENEL regulations governing aircraft noise which establish a maximum single event noise exposure level and violations of which, under the legislation, constituted a misdemeanor punishable by a fine of $1,000. The criminally-sanctioned SENEL regulations were to be enforced not by the airport proprietor but rather by the county in which the airport happened to be located. The court properly stated that these provisions

> "are *a per se unlawful exercise of police power* into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce." (Emphasis added). 389 F.Supp. at 65.

The regulations governing *airport* noise known as CNEL (community noise emission levels) establish maximum noise emission levels and require airport proprietors to bring their airports into compliance by specifying various options. The options include measures which affect flight operations, such as restrictions on flight frequency, particularly nighttime curfews, as well as various land use controls. After analyzing the legislative history of §611, its contemporaneous construction and footnote 14 of the *Burbank* opinion, quoted above, the *Crotti* court ruled that Congress did not intend to preempt the right of an airport proprietor to regulate in the field of aircraft noise, nor the right of a State to direct its own airport operators to adopt such regulations. It, therefore, concluded that:

> "the CNEL provisions and regulations are not per se invalid as delving into and regulating a field of aircraft operation engaged in direct flight, which is pre-empted unto the federal government under the Constitution and the laws of the United States." 389 F.Supp. at 65.[15]

Accordingly, the plaintiffs here are incorrect when they assert that *Crotti* invalidates on preemption grounds an airport proprietor's restrictions like the present ban on Concorde operations. Our reading of *Crotti* accords with that of the United States Department of Transporta-

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[15] The *Crotti* court, however, deferred decision on whether any of the CNEL provisions which affects flight operations constitutes an undue burden on commerce in violation of the Constitution's Commerce Clause because it found that no airport had "as yet taken definitive action in the field of controlling aircraft traffic under CNEL." 387 F. Supp. at 65. A possible argument based upon a burden on commerce contention is not now before this Court since the plaintiffs here have carefully refrained from contending that the Port Authority's temporary ban on Concorde operations constitutes an undue, and therefore, unconstitutional burden on foreign commerce. And, as will be noted below, such an argument would, in our opinion, not be well-taken.

tion. On December 2, 1975 John W. Barnum, Deputy Secretary of Transportation and former DOT General Counsel, informed the Subcommittee on Aviation of the House Committee on Public Works that his Department has

> "taken the position that State legislation that directs the actions of airport proprietors created by State law —that is, legislation that is a proper exercise of a state's proprietary interest in its airports—is not yet preempted.
>
> "That latter view has been adopted by the three-judge district court in the ***Air Transport Association*** v. *Crotti,* a challenge by the airlines to a California airport noise statute that mixed elements of the State's proprietary interest with police power measures. The court struck down the police power sections, upheld the proprietary measures, and left the toughest issue—the question of a burden on interstate commerce—for later decision. A trial on that question is anticipated.[16]
>
> "That is the present state of the law on Federal preemption of airport noise regulation." *Aircraft Noise Policy Hearings,* p. 5

A little over a month ago a United States District Court in California upheld an anti-noise ordinance enacted by the City of Hayward, in its capacity as proprietor of the Hayward Air Terminal. *National Aviation, et al.* v. *City of Hayward,* —— F. Supp. ——, No. C-75-2279, (N.D. Calif., July 13, 1976). The ordinance, which imposed a nighttime curfew on aircraft exceeding a noise level of 75 dBA, was attacked as invading a Federally preempted field as evidenced by the comprehensive nature of the Congressional

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[16] As pointed out in footnote 15, the burden on commerce argument is not made by the present plaintiffs and is, therefore, not before this Court.

regulatory scheme of air traffic control and also as an undue burden on commerce. The court, in an opinion by Judge Peckham, first analyzed *Burbank, Crotti* and *Griggs* as well as the legislative history of the 1968 noise abatement amendment. In language equally applicable here it ruled:

> "Accordingly, while the Congressional purpose was undoubtedly clear enough to the *Burbank* majority to rule that a municipality's police power regulations regarding aircraft noise at an airport, which it was not the proprietor of, invaded an area exclusively reserved for federal control, this court cannot, in light of the clear Congressional statement that the amendments to the Federal Aviation Act were not designed to and would not 'prevent airport proprietors from excluding any aircraft on the basis of noise considerations', make the same finding with respect to regulations adopted by municipal airport proprietors." Slip opinion p. 14. See Appendix B,* pp. 17a-18a.

**G. The proposed FAA airport noise policy.**

On July 9, 1975, the FAA published in the *Federal Register* a request for public comment on the development of an airport noise policy to complement its existing program of controlling aircraft noise at its source. Vol. 40, No. 132, p. 28815-6. This proposed policy was recently described by Frederick A. Meister, FAA Acting Associate Administrator for Policy Development and Review, in testimony given on December 7, 1975, before the Subcommittee on Aviation of the House Committee on Public Works and Transportation in the course of the Subcommittee's hearings on Current and Proposed Federal Policy on the Abatement of Aircraft Noise:

> "Existing or contemplated restrictions imposed by local airport authorities indicate the need for establishing and enunciating a definitive Federal policy.

*Renumbered Appendix I-B before the Second Circuit.

Examples of the restrictions are: (1) Curfews or the limitation on the hours of airport operation; (2) A total ban on jet-powered aircraft; (3) a ban or curfew on all aircraft which do not meet FAR Part 36 noise level criteria; (4) a ban or curfew on all jet aircraft which do not meet FAR Part 36 level criteria; and (5) a limit on the number of operations.

"The policy will identify the role of the FAA in the national aviation system and interstate commerce in relation to the nation's airport operators. Several policy options are identified: (1) Airport proprietor actions unconstrained by FAA; (2) Airport proprietor completely constrained by FAA with a correlated development of a Federal airport noise abatement plan; (3) Airport proprietor required to establish a noise abatement plan, and (4) Continue the present policy." *Aircraft Noise Policy Hearings*, pp. 58-59.

The legal justification for a Federal airport noise abatement plan which would preempt all airport proprietors' noise restrictions (Option 2) was set forth by Deputy Transportation Secretary John W. Barnum at the same subcommittee hearings:

"Our view of the present state of the law is . . . as follows. The Congress has, in section 611, provided authority to the FAA to preempt noise regulation of air carriers and other operators of aircraft, but until the FAA takes some action—that is, until there is either a particular Federal regulation, or an overall regulatory scheme with which an airport proprietor's actions might conflict, airport proprietors are free to act. There are, however, two important limitations to that principle. A proprietor must act in a nondiscriminatory manner, and he may not regulate in such a way as to impose an undue burden on interstate

commerce.[17] We have also taken the position that State legislation that directs the actions of airport proprietors created by State law—that is, legislation that is a proper exercise of a State's proprietary interest in its airports—is not yet preempted." *Aircraft Noise Policy Hearings,* p. 5.

Mr. Barnum went on to explain, however, that there was great difficulty in developing a Federal airport noise abatement plan which would not unreasonably burden interstate commerce:

> "In any event, the burden question cannot easily be addressed by a single set of regulations or by national legislation. The national air traffic scheduling system and the national airport system are so complex that such a solution would be fraught with difficulties. Federal authority to regulate in the area already exists; the time and effort the Congress would be compelled to invest in a legislative solution would be immense. Establishment of a Federal preemption in advance of a Federal regulatory program would, in our view, be most unwise. There is much that can be done by airport proprietors to provide noise relief, and the efforts should not be cut off now, before alternative solutions are devised." *Aircraft Noise Policy Hearings,* p. 6.

As this is being written, we have been informed that Secretary of Transportation Coleman has sent his recommendations on the proposed FAA airport noise policy to the Office of Management and Budget.

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[17] We do not agree with Mr. Barnum that the FAA can, without new Congressional legislation, totally preempt the existing powers of airport proprietors. In view of the clear legislative history concerning the right of an airport proprietor to ban noisy aircraft —and under *Southern Pacific* v. *Arizona, supra,* it is Congress' intent which is controlling—any such attempt to preempt by the FAA would be *ultra vires* its current statutory authority. In our judgment, Congress has not as yet authorized the FAA to assume the airport operators' liability under *Griggs,* an inevitable consequence of complete Federal preemption.

**H. Secretary Coleman's February 4, 1976 Concorde decision and the Port Authority's temporary ban on Concorde operations.**

Plaintiffs' final point in their memorandum is that "The Port Authority's Attempt to Prohibit or Delay Concorde Flights Collides Squarely with the Secretary's Decision." Memo, p. 41. This is just not true. In the first place, plaintiffs' cases do not support their argument. *Hempstead* and *Cedarhurst, supra,* held that local governments, in exercising their police powers, cannot deny use of the Federally-created civil airways to aircraft since the Federal Aviation Act of 1958 and its predecessors had granted "a public right of freedom of transit" through those airways. The third case plaintiffs cite, *American Airlines, Inc.* v. *City of Audobon Park, Kentucky,* 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd,* 407 F.2d 1306 (6th Cir. 1969), is to the same effect. But, as we have seen, unlike the situation with respect to the civil airways, Congress has deliberately refrained from granting a similar right to aircraft in so far as public airports are concerned. This is a matter which Congress has left for determination by the airport proprietor.

As John W. Barnum, Deputy DOT Secretary, informed the Subcommittee on Aviation of the House Committee on Public Works on December 2, 1975:

> "airport operators have always enjoyed considerable freedom of action in connection with the construction and management of their airports . . . [I]n view of the fact that . . . *Griggs* v. *Allegheny* established that airport operators are liable for noise damages resulting from aircraft operations to and from their airports, it would be anomalous to prevent an airport operator from taking action to limit his own liability.
>
> "The legislative history of section 611 of the Federal Aviation Act and the amendments to it in the Noise Control Act of 1972 indicate that the Congress did not

intend to alter the basic balance between Federal authority and the local proprietor's rights and responsibilities. . . ." *Aircraft Noise Policy Hearings,* p. 5.

In the second place, what Secretary Coleman did in his February 4, 1976 decision was to grant the plaintiffs whatever authorizations or permissions they needed under Federal law in order to commence Concorde operations at Dulles and JFK airports. He did not give them permission to use JFK, nor did he purport to do so. His decision is very clear on this point. He observed that:

"The FAA is the proprietor of Dulles and it is therefore part of my decision today to direct the Federal Aviation Administrator to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. (Coleman decision, February 4, 1976, Footnote 6, p. 3).

He pointed out that the situation at JFK:

"may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights." *Ibid.*[18]

Because of the possible ambiguity in the Secretary's use of the phrase "federal policy that has hitherto prevailed", Mr. Coleman amplified his February 4th language in a statement issued on March 24th (Answer of Port Authority defendants, Exhibit I.) Mr. Coleman said that his previous

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[18] In view of the legislative history described above, the meaning of the phrase "under certain circumstances" is apparent. The phrase "certain circumstances" refers to two possibilities. First, that the airport proprietor's action may be invalid because it is discriminatory, a possibility not claimed by the present plantiffs, and second, it may be contended that the proprietor's action constitutes an undue, and therefore, invalid burden on commerce, likewise a possibility not claimed by the present plaintiffs. See footnotes 15 & 16 as far as this second possibility is concerned.

"statement was made in recognition of the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights. *For the present this remains the policy of the department.*" (Emphasis added).[19]

Mr. Coleman's March 24th statement took note of the possible penalty which the New York region would experience if it bars Concorde flights:

"If New York does not participate [in Concorde operations] it runs the risk that it will not maintain its position as the major airport for international travel to Europe."

But for present purposes the significant point is that the Port Authority's temporary ban is quite obviously permitted by, and not contrary to, existing Federal policy as that policy is understood by the responsible Federal officials concerned. While Mr. Coleman might not be happy with the Port Authority's action in temporarily banning the Concorde from JFK, anymore than the FAA approved of this agency's comparable action in the *Eastern Airlines* case, he is quite obviously acquiescing in it and, to use Judge Bartels' language in *Eastern Airlines,* "is not prepared at the present time . . . to preempt . . . in contradiction of the Port Authority's rules. . . ." 259 F. Supp. at 753. It will be recalled that in rejecting the airline's preemption argument in *Eastern,* Judge Bartels attached great weight to the fact that "although fully advised of this

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[19] Mr. Coleman's March 24, 1976 statement was commented on as follows by Judge Foley in *Brown* v. *Carey,* —— F.Supp. ——, No. 76-CV-103, (N.D.N.Y. 1976):

"It is interesting to note that on March 24, 1976, the Secretary stated that it was established federal policy that a local airport proprietor under certain circumstances has had authority to refuse landing rights, and for the present it remains the policy of the department of transportation."

proceeding . . . the FAA has made no effort to intervene." *Ibid* at 753. That is equally the situation here.

We end our argument by emphasizing that what Mr. Coleman chooses to call "federal policy" which permits "a local airport proprietor to refuse landing rights" to noisy aircraft, if it so desires, is the very policy required by the regulatory system over air commerce which Congress has established pursuant to its commerce clause powers.

## POINT II

**No treaty or agreement between the United States and the French Republic or between the United States and the United Kingdom takes away from an airport proprietor the right to impose, in the interest of noise abatement, non-discriminatory restrictions on aircraft users like the temporary ban here at issue, nor does such a ban invalidly interfere with the Federal Government's authority to conduct foreign relations.**

Plaintiffs contend that inasmuch as they have received all Federal permissions required, under applicable international agreements, for the commencement of Concorde operations at JFK, those agreements entitle them to conduct such operations even without Port Authority approval. Their contention, however, does not accord with the understanding of the contracting nations.

The final environmental impact statement (EIS) on the Concorde which the FAA published in September 1975, specifically states that at meetings held on January 23 and 24, 1975, among the FAA, the Office of the Secretary of Transportation and the British and French Governments:

> "it was understood that regardless of the Federal decision on the applications, [for amendments to operations specifications] the airlines [Air France

> and British Airways] must obtain any necessary authorization from the airport operators whose airports they propose to serve before flights could be conducted to those airports. In this instance, while FAA operates Dulles International Airport, the Port Authority of New York and New Jersey operates John F. Kennedy International Airport." (Final EIS, pp. I-4, I-5). See Appendix E,* submitted herewith.

The final EIS makes it clear beyond doubt that the permission required from the local airport proprietor could be conditioned on the Concorde's ability to meet airport noise restrictions:

> "Prior to the conduct of any route-proving flights, or the initiation of regularly scheduled commercial operation of the Concorde, the operator of the aircraft must obtain the necessary authorizations from the operator (s) of the specific airport (s) involved.[20] The Port Authority of New York and New Jersey has a long-standing noise limit at JFK of 112 PNdB (perceived noise decibels) at specific locations under departure paths." (Final EIS, p. IV-22).

The draft EIS, which had been published in March, 1975 and which contained virtually identical statements to those quoted above, (pp. 4, 21) went on to point out:

> "Since some Concorde flights may be conducted into and out of Dulles International Airport, which is owned by the Federal Government and operated by the FAA, action by the FAA in its role as airport

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[20] Chapter X of the Final EIS, RESPONSE TO SUBSTANTIVE COMMENTS contains the following summarized comment on the Draft EIS and the FAA's response thereto:

> "8. *Comment:* Will airport operators be free to impose their own restrictions on the operation of the Concorde? *Response:* Yes. The airport operators will be free to impose non-discriminatory restrictions on the operation of the Concorde . . ." (p. X-29).

*Renumbered Appendix I-E before the Second Circuit.

operator is included within the scope of this EIS." (Draft EIS, p. 7). See Appendix F,* submitted herewith.

And, as we have seen, Secretary Coleman's February 4, 1976 decision on the Concorde also indicated that it could not be operated into local airports without permission from the local airport proprietor. Thus, not only did the Secretary direct the FAA to amend provisionally the operations specifications of British Airways and Air France to permit them to conduct Concorde flights at Dulles and JFK, but he also specifically directed the FAA, in its capacity as the proprietor of Dulles, to permit such flights at that airport. But the situation at JFK, he observed, was "complicated by the fact that under federal policy . . . a local airport proprietor has had authority under certain circumstances to refuse landing rights." Failure to admit the Concorde to JFK, he said, "would greatly diminish, but . . . it would not destroy the validity of the demonstration." Secretary Coleman's decision, p. 3, footnote 6. The Secretary's language clearly shows that the only possible constraint that may exist upon the Port Authority's power to refuse permission for Concorde flights at JFK is found in the domestic law of the United States.

**A. Neither the Chicago Convention, nor the bilateral agreements with the French Republic and the United Kingdom, require the Federal Government to admit the Concorde.**

Fundamental to a determination of the validity of the Port Authority's temporary ban on Concorde operations at JFK, is the right of the Federal Government, under the Chicago Convention and the bilateral agreements with France and Great Britain,[21] to ban the Concorde from land-

[21] Convention on International Civil Aviation, 61 Stat. 1180, T.I.A.S. No. 1591 (December 7, 1944); Air Services Agreement between the United States and the United Kingdom. 60 Stat. 1499, T.I.A.S. No. 1507 (February 11, 1946); Air Services Agreement between the United States and France. 61 Stat. 3446, T.I.A.S. No. 1679 (March 27, 1946).

*Renumbered Appendix I-F before the Second Circuit.

ing at United States' airports on the basis of its noise characteristics.

The United States Department of State has determined that restrictions on aircraft use, based on noise, are legally permissible under the agreements which establish the basic framework of international aviation law, including the Chicago Convention and the standard bilateral arrangements. This determination is contained in a statement submitted by the State Department to the Aviation Subcommittee of the House Committee on Public Works and Transportation in December, 1975, at the time the Subcommittee was studying, *inter alia,* what action, if any, Congress should take to protect the American public, especially airport neighbors, from the noise generated by the Concorde. The prepared statement delivered by Phillip R. Trimble, Assistant Legal Advisor for Economic and Business Affairs, Department of State, outlines the basis for this view:

> "Foreign air carriers are not permitted to operate into the United States without the permission of the U.S. Government which, in most cases, is granted pursuant to international agreement. There are several such agreements which establish the basic framework of international aviation law.
>
> "The principal international agreement in this field is the 1944 Convention on International Civil Aviation, commonly referred to as the 'Chicago convention.' This convention, which is now in force for well over 100 countries [including the United States, Great Britain and France], establishes the conditions for operation of civil aircraft into the airspace of other parties to the convention.
>
> "Among other things, it provides that each party grants to the aircraft of the other parties engaged in nonscheduled service the right to make flights into its territory, and to make stops within its territory for

nontraffic purposes. Similarly, the 1944 International Air Services Transit Agreement provides that each party grants to the aircraft of other parties the privilege of making scheduled flights across its territory without landing, as well as the privilege for scheduled flights to land for nontraffic purposes.

"However, neither the Chicago convention nor the transit agreement grants a right to stop in the territory of another party for the purpose of picking up or discharging passengers or other traffic. In fact, article 6 of the Chicago convention specifically provides:

> 'No scheduled international air service may be operated over or into the territory of a Contracting State, except with the special permission or other authorization of that State and in accordance with the terms of such permission or authorization.'

"Such rights—in the area of scheduled air services—are the subject of a series of bilateral agreements. Under a typical bilateral agreement, each party is given the right to conduct air services by its designated carrier or carriers on specified routes into the territory of the other party. However, there are restrictions on the rights accorded under these agreements.

"For example, a designated carrier is required to fulfill U.S. laws and regulations normally applied to the operations of commercial air carriers. Furthermore, in the standard bilateral, it is provided that airlines of the other party must comply with our laws and regulations relating to the 'admission' and 'departure' of aircraft, as well as laws and regulations relating to the 'operation and navigation' of aircraft within our territory. The Chicago convention and the transit agreement contain the same requirement.

"At the same time, the Chicago convention requires that these laws and regulations must be nondiscriminatory.

"Article 11 provides:

'Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.'

"Thus, these articles clearly recognize that a country has the right to impose nondiscriminatory requirements relating to the entry and operations of the aircraft of other parties into its territory." *Aircraft Noise Policy Hearings,* pp. 209-210.

Mr. Trimble specifically addressed the question of the validity of regulations dealing directly with the noise level produced by aircraft engines—noise levels which cannot be reduced by flight procedures. After observing that Article 5 of the standard bilateral agreement [Art. 5(1) of our bilateral with Great Britain and Art. V (a) of our bilateral with France[22]] permits regulation of the operation of aircraft, Mr. Trimble concluded that:

"such a regulation would fall within the type of laws and regulations normally applied to the operations of

[22] These articles both provide that

"The laws and regulations of one Contracting Party relating to entry into or departure from its territory of aircraft engaged in international air navigation or to the operation and navigation of such aircraft while within its territory shall apply to aircraft of the designated air carrier or carriers of the other Contracting Party."

air carriers which designated carriers are expressly required to comply with [in] the bilateral agreements. Furthermore, even if noise regulation were not construed to be within any of the express provisions of the bilateral agreements, we believe that it still would not be prohibited by them. It would simply not be covered." *Aircraft Noise Policy Hearings*, p. 211.

Mr. Trimble emphasized that such regulation, of course, cannot be discriminatory:

"Although we have concluded that a nation retains the legal right to impose laws and regulations relating to noise standards applicable to aircraft within its territory, article 11 makes it clear—along with article 15 and other provisions—that these laws and regulations must be applied without distinction as to nationality—that is, in a fair and nondiscriminatory fashion." *Aircraft Noise Policy Hearings*, p. 212.[23]

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[23] Mr. Trimble's prepared statement also referred to ICAO's recently adopted noise standards for subsonic jet aircraft produced after 1972. In a subsequent statement filed with the Subcommittee, Mr. Trimble pointed out that the ICAO Council was acting under article 37 of the Chicago Convention pursuant to a 1968 ICAO Assembly resolution which resulted in the convening in 1969 of a special meeting on aircraft noise in the vicinity of aerodromes. The ICAO Standards were adopted by the Council as Annex 16. It is significant that the report of the 1969 special meeting observed that foreign aircraft operating at airports located in ICAO member States and complying with the ICAO noise standards set forth in Annex 16:

"would, noisewise, be allowed to operate subject only to such additional noise restrictions that might be specified by the responsible authority (ies) in relation to an aerodrome(s) due to local considerations applied on a non-discriminatory basis as between foreign and domestic aircraft." Report of the Special Meeting on Aircraft Noise in the Vicinity of Aerodromes, held at Montreal, 25 November-17 December 1969, approved by the Meeting and issued by authority of ICAO's Secretary General. Doc. 8857, NOISE (1969), § 3:1-3. See Appendix G,* pp. 66a-67a.

*Renumbered Appendix I-G before the Second Circuit.

Secretary Coleman shares the State Department's view that neither the Chicago Convention, nor the bilaterals, preclude the Federal Government from prohibiting Concorde operations in the United States on the basis of noise considerations. Thus, following a painstaking four-page analysis of the international agreements, discussed above by Mr. Trimble, relevant to the Concorde question, Secretary Coleman stated that he has

> "concluded that I am not compelled by treaty . . . to admit the Concorde . . ." The Secretary's Decision on Concorde Supersonic Transport, February 4, 1976, p. 21.

**B. Under the Chicago Convention and the bilateral agreements with the French Republic and the United Kingdom, the Port Authority, like the Federal Government, can ban Concorde operations because of noise considerations.**

Mr. Trimble was asked the following question by Congressman Taylor at the same House aviation subcommittee hearings:

> "Mr. Trimble, under international agreement, can local airport authorities forbid the landing of any aircraft?" *Aircraft Noise Policy Hearings,* p. 229.

In responding to this question, it is significant that Mr. Trimble did not assert that such action would be prohibited by any international agreement. Instead, his response was premised on the conclusion that action by an airport proprietor forbidding the landing of an aircraft is indeed permitted. His answer was that any action by a local airport authority banning a particular aircraft would be subject to the same treaty obligations to which the Federal Government is subject—namely, it could not be discriminatory.[24] And, as we have seen, the Federal Gov-

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[24] The entire colloquy between Congressman Taylor and Mr. Trimble was as follows:

ernment could bar the Concorde because of noise considerations.

Article 15 of the Chicago Convention deals specifically with airports. It provides in part:

> "Every airport in a contracting State which is open to public use by its national aircraft shall likewise . . . be open under uniform conditions to the aircraft of all the other contracting States."

Quite obviously, the clear import of this language is that airport operators can adopt reasonable conditions governing the use of their facilities provided such conditions are non-discriminatory.[25]

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"MR. TAYLOR. Mr. Trimble, under international agreement, can local airport authorities forbid the landing of any aircraft?

"MR. TRIMBLE. Well, local authorities are subject to the same strictures as the Federal Government as far as regulations are concerned.

"For example, the provision in the Chicago convention providing for nondiscriminatory application of regulations whould [sic] also apply with equal force to local authorities.

"Now, as you know, there are additional domestic legal considerations that are involved when you have a noise regulation by a local airport. There is a question of whether such regulation would be an unreasonable burden on the interstate or foreign commerce.

"And then there is also a question of Federal preemption, whether the Federal Aviation Act preempts the field and those questions have not been definitively answered.

"But, even assuming that they were answered in such a way that the local airport authority had the right to institute particular regulations, then they would be subject to the same treaty obligations that the U.S. Government is subject to." *Aircraft Noise Policy Hearings*, pp. 229-230.

[25] Secretary of State Rogers has taken the position that the provisions of Article 15 are applicable to scheduled operations conducted pursuant to our 1946 bilateral agreement with Great Britain. Indeed, he invoked Article 15 in protesting discriminatory restrictions imposed by the United Kingdom on nighttime landings of cargo aircraft by United States' airlines at Heathrow Airport.

The only other restriction placed on airport operators in Article 15 relates to airport charges. It requires that "Any charges that may be imposed *or permitted to be imposed* by a contracting State for the use of such airports . . . by the aircraft of any other contracting State" shall not be discriminatory. (Emphasis added). The quoted language recognizes that airports are not necessarily owned and operated by the national governments of the contracting States.

By itself Article 15 alone supports the conclusion that the Port Authority's temporary ban on Concorde operations is valid. The Convention's other provisions must, of course, be construed so as to carry out Article 15's clear intent—namely that airport operators can impose reasonable non-discriminatory conditions on the use of their airports by aircraft. Secretary Coleman concurred in this view on February 10, 1976, just six days after his Concorde decision, when he advised the Subcommittee that under Article 11 of the Chicago Convention, quoted above on p. 51 of this memorandum, aircraft must comply with regulations promulgated by local airport operators.

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The following statement was submitted for the record by Mr. Trimble at the same Aviation Subcommittee Hearings.

> "The U.S. has often taken the position that foreign governments were violating the provisions of the Convention on International Civil Aviation. We informed Italy in 1974 that it was violating Article 15 of the Convention because it was exempting Alitalia from airport charges at Rome but charging U.S. and other foreign air carriers. *We similarly invoked Article 15, and other provisions, in the case of U.K. restrictions on night landings of cargo aircraft by a U.S. airline at Heathrow Airport. The U.K. authorities reversed their position as a result of these U.S. representations.* Many other similar cases could be cited with regard to Article 15". (Emphasis Added) *Aircraft Noise Policy Hearings*, p. 225.

Secretary of State Rogers' letter protesting discriminatory restrictions at Heathrow Airport is reprinted in Appendix *H*.*

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*Renumbered Appendix I-H before the Second Circuit.

The Secretary's conclusion was given in response to a detailed series of questions posed by Congressman Anderson, Subcommittee Chairman. The final question dealt with the ultimate authority of an airport proprietor to deny landing rights to the Concorde for the conduct of commercial operations. Secretary Coleman said that under the Chicago Convention the right of foreign air carriers to conduct commercial as well as non-commercial flights into the United States:

> "is qualified by the requirement under Article II [sic] that all aircraft engaged in international air navigation comply with laws and regulations of a contracting State relating to the admission or departure of aircraft from its territory. Thus the Port Authority has the right to regulate both non-revenue and revenue flights, although the extent to which the Port Authority can regulate may be open to question." [26] *Aircraft Noise Policy Hearings*, p. 699.

In an earlier question, Secretary Coleman had been asked (1) whether British Airways and Air France could, under the Chicago Convention, operate four Concorde flights a day into the United States on a non-revenue, non-scheduled basis and (2) what about the selection of airports. The Secretary's response was "They could operate four or more flights *if the airport proprietors involved agree*, but they would not be likely to do so without passenger revenues." (Emphasis added) *Aircraft Noise Policy Hearings*, p. 699

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[26] The Secretary's qualification on the Port Authority's right to regulate Concorde flights was made clear in answer to another question when he stated:

> "It is our view that such action by an airport proprietor which is nondiscriminatory and not an unreasonable burden on foreign or interstate commerce has not been preempted by FAA action. Depending on the manner in which the Port Authority or the States of New York and New Jersey take such action, it could be found to place an undue burden on foreign commerce or to discriminate unreasonably." *Aircraft Noise Policy Hearings*, p. 705.

Substantial weight must, of course, be given to the views of the State Department and Secretary Coleman. Section 152 of the Restatement of Foreign Relations Law of the United States declares:

> "In interpreting an international agreement for the purpose of determining its effect as domestic law, a court in the United States gives great weight to an interpretation made by the executive branch. . . ."

Moreover, the meaning given to specific words contained in an international agreement must be consistent with the intent and purpose of the agreement. *Maximov* v. *United States,* 299 F. 2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963); Restatement of Foreign Relations Law of the United States §147, 151 (1965).

Secretary Coleman's conclusion that the laws and regulations of a local United States airport operator are to be construed as "laws and regulations of a contracting State" within the meaning of Article 11 of the Chicago Convention is the only possible construction of the Article's language which accords with the intent and basic purpose of that treaty and the other agreements which together establish the basic framework of international aviation law.

As Mr. Trimble's prepared statement pointed out:

> "The Chicago convention is intended to end discrimination on the basis of nationality, ultimately detrimental to the interest of all, in respect of aviation. And the same principle applies for commercial operations where we have established bilateral relations." *Aircraft Noise Policy Hearings,* p. 212.

There is no allegation or intimation here that the Port Authority's decision is in any way related to the nationality of the plaintiffs or the manufacturers of the Concorde. In fact, the British Government itself acknowledged that the Concorde may not be able to meet its own noise stan-

dards at Heathrow Airport and found it necessary to exempt the Concorde from compliance with those standards.[27]

Airports are, of course, an integral part of the air transportation system. Unlike airports in Great Britain and France, which are owned and operated by agencies of the national governments, virtually all United States airports are owned and controlled by State and local governments as they were in the 1940's when the Chicago Convention and the bilaterals were negotiated. It would be the rankest form of discrimination if Article 11 was interpreted as encompassing laws and regulations governing aircraft operations at British and French airports but not at locally operated American airports.

The parties to the Chicago Convention were well aware that airports, especially those in the United States, were not owned and operated by national governments. Article 15 specifically recognizes this by requiring that "Any charges that may be imposed *or permitted to be imposed* by a contracting State for the use of such airports. . . by the aircraft of any other contracting State" shall not be discriminatory.[28] (Emphasis added).

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[27] The Concorde is not required to comply with the PNdB restrictions at Heathrow. The British Secretary of State for Trade, Mr. Shore, determined to give the Concorde special treatment following an evaluation of the noise measurements made on that aircraft during its endurance trials conducted at Heathrow:

> "Mr. Rooker asked the Secretary of State for Trade whether he is now able to state whether the Heathrow noise limits will apply to Concorde when it enters operational service.
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> "Mr. Shore: Arising out of evaluation of the endurance trials, noise abatement procedures are being adopted which should result in an improvement in Concorde's noise performance. These will be developed in operational service. I have, therefore, decided that Concorde will be exempted from Heathrow's noise limits. Monitoring will continue under a variety of conditions." 903 PARLIAMENTARY DEBATES, House of Commons, 236 (January 15, 1976) (Written Answers).

[28] Article III(a) of our bilateral with France and Article 3(1) of our bilateral with Great Britain also provide that:

> "(1) The charges which either of the Contracting Parties *may impose or permit to be imposed*, on the designated air carrier

It would also be contradictory to construe Article 11 to include airport regulations adopted by unitary nations like France and Great Britain, but to exclude those nations with Federal systems like the United States. The contradiction would stem from the fact that the fundamental purpose of the treaty was to end discrimination on the basis of nationality. Furthermore, it is improbable that the United States would have bargained away the right of our airport proprietors to regulate foreign aircraft in the context of local airport conditions, without obtaining the corresponding benefit for American air carriers.[29]

Unless the virtually identical phrase "the laws and regulations of one Contracting Party" which appears in a multitude of bilateral agreements entered into between the United States and other nations, including France and Great Britain, is construed to include those regulations

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or carriers of the other Contracting Party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international air services. (Emphasis added).

[29] It is even more improbable that the United States would have bargained away such rights in the bilaterals since to do so would have contravened the existing congressional policy, set forth in the Civil Aeronautics Act of 1938, that control of airports should remain with municipal government. See pp. 17-19 of this memorandum. The fact is that President Truman invoked provisions of that very act, together with constitutional powers, as authority for the execution of the bilateral agreements. See "Validity of Commercial Aviation Agreements", 40 OP. ATT'Y GEN. 451 (1946). Obviously, the President neither intended, nor was empowered, to overturn by executive agreement, an important national policy contained in such authorizing legislation. Thus, an official statement of the State Department submitted to the Senate Committee on Commerce in 1946 assured the Committee that for the past 20 years executive agreements in the field of civil aviation had been entirely consistent with authorizing legislation and observed that "so long as these agreements remain within the scope of declared congressional policy" there would appear to be no objection whatsoever to their continued use. *Hearings on Civil Aviation Agreements conducted by the Senate Committee on Commerce,* 79th Cong., 2d Sess. at 132, 136 (1946).

which an American airport proprietor is free to promulgate under domestic law, American air carriers would be required to comply with localized noise restrictions now in force at dozens of airports throughout the world[30] but foreign air carriers would be exempt from those imposed by local American airport proprietors. For example, American carriers would be required to comply with noise restrictions at London's Heathrow Airport but British carriers would be exempt from noise restrictions at JFK.[31] International agreements ought not to be construed, if at all possible, by the judiciary to permit such preference for one nation over another. Thus, in *Todok* v. *Union State Bank*, 281 U.S. 449, 454, 455 (1930) Chief Justice Hughes said:

> "This conclusion seems to us to be repugnant to the purpose of the treaty. While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other."

Finally, plaintiffs are mistaken when they contend that the Port Authority's Concorde ban directly interferes with

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[30] *Aircraft Noise Policy Hearings*, p. 30.

[31] Currently, at JFK subsonic jet takeoff limits are set at 112 PNdB; those at Heathrow are set at 110 PNdB for daytime operations and 102 PNdB for nighttime operations. In addition, at JFK nighttime take-offs of subsonic jets are limited to over-water runways. At Heathrow, a limit is placed on the total number of nighttime movements by these aircraft, and these movements are rationed among the carriers. *Action Against Aircraft Noise, Progress Report, 1973*, Department of Trade and Industry, United Kingdom, submitted herewith as Appendix I; Letter from the United States Secretary of State to the British Ambassador to the United States dated May 6 1971, also submitted herewith as Appendix H.*

*Renumbered Appendix I-H before the Second Circuit.

the right of Air France and British Airways to use aircraft certificated in a manner specifically agreed to in the bilateral agreements and the Chicago Convention. The fact is that the State Department has rejected a similar contention in reaching the conclusion that international agreements do not preclude the United States from applying aircraft noise standards to all aircraft within its territory. The State Department's position which was included in Mr. Trimble's statement to the Subcommittee on Aviation of the House Committee on Public Works and Transportation correctly pointed out that while the word "'Airworthiness' is not defined in the relevant agreements, . . . the dictionary meaning and common usage limit the scope of the term to 'safety matters.'" [32] *Aircraft Noise Policy Hearings*, p. 212.

**C. The Port Authority's temporary ban on Concorde operations does not invalidly interfere with the authority of the Federal Government to conduct foreign relations.**

The Port Authority's temporary ban on Concorde operations at JFK does not, as we have seen, violate applicable Federal law—whether statutory, treaty or otherwise. Nevertheless, plaintiffs claim that the Port Authority's ban invalidly interferes with the authority of the Federal Government to conduct foreign relations.[33] The responsible

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[32] The statement also noted that ICAO noise standards were not included in ICAO Annex 8 dealing with air worthiness of aircraft, but were, instead made the subject of a new Annex, ICAO Annex 16. *Aircraft Noise Policy Hearing*, p. 212.

[33] In the light of a series of recent Supreme Court "standing" decisions, it would appear that the instant plaintiffs lack any recognized injured interests that are protected by the constitutional provisions insuring exclusive Federal Government control over foreign affairs. *Simon* v. *Eastern Ky. Welfare Rights Org.*, —— U.S. ——, 48 L. Ed 2d 450, June 1, 1976; *Warth* v. *Seldin*, 419 U.S. 823 (1975); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974); *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Flast* v. *Cohen*, 392 U.S.

Federal officials evidently disagree. Indeed, it appears that in negotiating with foreign powers concerning air commerce, the Federal Government was always careful to preserve, and not contract away, the rights possessed by airport proprietors under domestic law. And, as previously noted, at meetings held on January 23 and 24, 1975 the British and French governments did not assert the contrary but "understood" that the instant plaintiffs

> "must also obtain any necessary authorization from the airport operators whose airports they propose to serve before [Concorde] flights could be conducted to those airports." Final EIS p. I-4.

In fact in the official correspondence between President Nixon and President Pompidou of France and between President Nixon and Prime Minister Heath of Great Britain the point was made that Concorde operations at local American airports must, of necessity, be conditioned by the requirements of our Federal system of air commerce regulation. President Nixon told President Pompidou that having "followed the progress of the Concorde for many years"

> "You must know, Mr. President, that many aspects of regulation of civil aviation are outside the jurisdiction and the control of the executive branch of our Federal Government. The Congress, the Civil Aeronautics Board at the Federal level, as well as State and local governments, have substantial powers in this field." *Aircraft Noise Policy Hearings,* pp. 223-224.

President Nixon similarly advised Prime Minister Heath:

> "You have noted, Mr. Prime Minister, that many aspects of the regulation of civil aviation are in this

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83 (1969). Clearly, the Federal Government has standing to object on this basis to the Port Authority's temporary ban but plaintiff air carriers would seem to lack the requisite standing to assert, against the Port Authority, rights belonging to the Government.

country outside the jurisdiction of the executive branch of our Federal Government. You must also know that the Federal Government's power to influence these aspects, particularly with regard to State and local jurisdictions, is limited." *Aircraft Noise Policy Hearings*, p. 223.

The Port Authority's action coincides rather than collides with the basics of American foreign policy. American foreign policy, in this particular area, is clearly reflective of the requirements of air commerce regulation in our Federal System which includes scope for appropriate action on the local level.

A contention remarkably similar to that made by the instant plaintiffs was recently rejected by both this Court and the Second Circuit in *Palladio* v. *Diamond*, 321 F. Supp. 630 (1970), *aff'd.* 440 F.2d 1319 (2d Cir. 1971), *cert. denied*, 404 U.S. 983 (1971).[34] This was a challenge to the constitutionality of a New York statute prohibiting the importation or sale of products made from the skins of endangered animals. As here, it was contended that the State action —the protection of additional species not protected by Federal regulations—invaded an area preempted by Federal regulations as well as invalidly interfered with Federal control over foreign affairs. Judge Mansfield of this Court rejected these contentions pointing out, specifically that there was no merit in the argument that the State law:

"interferes with Congress' power to regulate commerce and to make treaties [or] with federal control over

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[34] Plaintiffs' cases are not in point. They are concerned with statutes which deal exclusively with foreign nationals—alien registration, "Buy American", and inheritance rights of foreign citizens. Plaintiffs cite no cases and we have found none where, in the absence of international agreement or statute, it has been held that State action which does not discriminate between citizens and foreign nationals has been invalidated as invading the Federal Government's exclusive power over foreign affairs.

foreign affairs, and with the supremacy clause of the Constitution." 321 F. Supp. at p. 635.

*Palladio* presented a factual situation far more compelling than the instant one for an argument based on State interference with Federal Government control over foreign affairs. There, the challenged statute was an attempt by New York State to control extra-territorial activity—the killing of animals in foreign nations. Yet, the statute was upheld. Here, on the other hand, the Port Authority's temporary ban is clearly designed to protect its direct and immediate proprietary interest in its airport.

## CONCLUSION

In light of the foregoing, we respectfully submit that plaintiffs' motion for summary judgment be denied in all respects.

Respectfully submitted,

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New York, New York
August 17, 1976

II

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1276

(MP)

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

*Plaintiffs,*

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, *et al.*,

*Defendants.*

## DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT


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New York, New York
January 7, 1977

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1276

(MP)

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BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

*Plaintiffs,*

v.

THE PORT AUTHORITY OF NEW YORK
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## DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Our August 17, 1976 memorandum, in opposition to plaintiffs' motion for summary judgment, informed the Court that a decision was then pending on an FAA airport noise policy designed to identify and clarify the FAA's role in the national aviation system in relation to the nation's airport operators. (Memorandum, pp. 40-42).

This supplemental memorandum is submitted to advise the Court that on November 18, 1976, Secretary Coleman released this long-awaited airport noise policy as part of a comprehensive Department of Transportation-Federal Aviation Administration statement entitled *Aviation Noise Abatement Policy* (ANAP), a copy of which is attached hereto.*

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* Appendix II before the Second Circuit.

In our judgment, the comprehensive DOT-FAA policy statement convincingly demonstrates that the Port Authority's temporary ban on Concorde operations at Kennedy Airport is entirely consistent with all relevant federal statutes, treaties and policies in this field. The ANAP not only confirms the position taken in our August 17th memorandum that under applicable law, airport operators are empowered to impose airport noise restrictions, including a ban on noisy aircraft, (ANAP, p. 34), but specifically encourages such operators "to develop aggressive noise abatement programs for their airports." (ANAP, p. 9). Assurances are given that the FAA "will assist proprietors in attaining their noise abatement goals and will advise them on how their proposed plans affect the overall air transportation system." (ANAP, p. 9).

As the ANAP points out, aside from areas preempted by the Federal Government such as "airspace use and management, air traffic control, safety and the regulation of aircraft noise at the source" (ANAP, p. 34), the power and authority to control airport noise rests with the airport proprietor. Such power is

> "subject *only* to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management." (ANAP, p. 34, Emphasis added).

On this motion, plaintiffs do not contend that the Port Authority's temporary ban is invalid on any of these grounds.

It is, we believe, most significant that the ANAP was formulated after a full review of the severe noise problem at the major United States domestic and international airports as well as after a thorough study of the applicable statutes and case law. The magnitude of the noise prob-

lem together with the existing legal framework led Secretary Coleman to conclude that "a nationwide commitment, involving federal, local and private resources, is required to reduce the impact of aviation noise on the people who live in areas surrounding airports." (ANAP, p. 5). Consistent with this conclusion full Federal preemption of the aircraft noise problem, although considered, was expressly rejected. (ANAP, p. 34).

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January 7, 1977

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1276

(MP)

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

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v.

THE PORT AUTHORITY OF NEW YORK
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*Defendants.*

## POST-ARGUMENT MEMORANDUM OF PORT AUTHORITY DEFENDANTS

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# United States District Court

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1276
(MP)

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BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

*Plaintiffs,*

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, *et al.*,

*Defendants.*

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## POST-ARGUMENT MEMORANDUM OF PORT AUTHORITY DEFENDANTS

This memorandum deals with the principal points which the Court raised during oral argument on April 28, 1977. It is submitted pursuant to the permission which the Court granted to counsel at the conclusion of that argument. We believe the memorandum demonstrates—beyond any possible doubt whatsoever—the complete validity under Federal law—whether statutory, treaty or otherwise—of the Port Authority's temporary ban on Concorde operations at JFK.

1. The Court, *sua sponte,* indicated concern over "the legal competence of a local authority to tell the Secretary of Transportation that he may not engage in the stimulation of technological advances in transportation at JFK", Tr. p. 84, and in this connection directed counsels' attention to 49 U.S.C. §§1353, 1431, 1615 and 1653, sug-

gesting that these Sections[1] be read in conjunction with *Coxsey* v. *Hallaby,* 231 F.Supp. 978 (D.C. W.D. Okla 1964). Tr. pp. 84-85, 113-115, 117.

*Coxsey* was a suit by property owners against the FAA and other Federal agencies to enjoin the effectuation of a sonic boom test program. In dismissing the suit, the Court held, *inter alia,* that the test program was clearly authorized by 49 U.S.C. §1353(b), under which the Administrator purported to act, and did not deprive plaintiffs of their due process rights, the test program making adequate provision for any possible damage they might suffer.

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[1] Secretary Coleman's February 4, 1976 Concorde decision referred only to two of these four Sections, §§1431 and 1651, and then only in passing. Section 1431 was enacted in 1968 as the Aircraft Noise Abatement Amendment to the 1958 Federal Aviation Act. Its legislative history and contemporaneous administrative construction are discussed at length in our August 17, 1976 memorandum on pages 26-32. That discussion conclusively demonstrates that this act was not designed to preclude air terminal operators from banning noisy aircraft at their airports, and Secretary Coleman's decision, as well as all prior and subsequent administration actions and statements, is in complete accord with our interpretation of this statute.

Section 1651 was part of the 1966 legislation establishing the Department of Transportation; it merely declares in general terms the over-all policies to be effectuated by the newly created Department. Certainly, its generalized language cannot change Congress' intent clearly manifested two years later when it specifically confirmed an airport proprietor's power to refuse landing rights to aircraft based upon noise considerations in the course of enacting express legislation dealing with the noise problem. Moreover, §1651's language relating to the stimulation of technological advances can scarcely be interpreted to countenance action contrary to other clearly announced Congressional policies, in this case, leaving to airport proprietors the ultimate decision on the question of granting landing rights to noisy aircraft, or action contrary to the Fifth Amendment's requirements, in this case, the utilization of other people's property for Federal Government test purposes.

Sections 1353 and 1653 are nowhere mentioned in Secretary Coleman's meticulously worded 61-page decision. See discussion *of NLRB* v. *Columbia University,* 541 F.2d 922 (2d Cir. 1976), at p. 4, *infra.*

The test flights in *Coxsey* utilized Tinker Air Force Base and, as the affidavit of Col. William A. Gunter,[2] U.S.A.F., Director of Operations, Oklahoma City Air Defense Section, submitted in that litigation, makes clear, all "flights were conducted pursuant to an agreement entered into by representatives of the Federal Aviation Agency and the Department of Air Force" and all "flights were flown by pilots in the military service of the United States Air Force." Appendix A*, p. 1a.

Furthermore, as the affidavit of Gordon F. Bain,[3] Deputy FAA Administrator for Supersonic Transport, also submitted in that litigation, emphasized, the test program was expressly conducted "under the authority vested in the FAA Administrator by Section 312(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1353(b)) to undertake developmental work toward creation of improved aircraft" and for which "Congress appropriated $60 million to the FAA for fiscal year 1964 (77 Stat. 430, Ex. B)." Appendix B*, p. 4a. Mr. Bain's affidav also points out that as part of the sonic boom testing program, the

> "FAA effected arrangements with the Air Force for evaluation and payment of valid claims by the Claims officer at Tinker Air Force Base, with reimbursement by the FAA." Appendix B*, p. 6a.

Additionally, as the affidavit of Albert M. Kuhfeld,[4] U.S.A.F. Judge Advocate General, likewise submitted in that litigation, states, the Military Claims Act, 10 U.S.C. §2733, authorizes the administrative settlement and payment of

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[2] A copy of Col. Gunter's affidavit is contained in Appendix A* to this memorandum.

[3] Extracts from Mr. Bain's affidavit are contained in Appendix B* to this memorandum.

[4] Extracts from General Kuhfeld's affidavit are contained in Appendix C* to this memorandum.

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*Renumbered Appendix III-A, Appendix III-B, and Appendix III-C, respectively before the Second Circuit.

"claims against the United States for damage to or loss of property when caused by the non-combat activities of the United States Air Force, including those damages and losses alleged to have resulted from the phenomenon of pressure waves which build up around aircraft flying faster than the speed of sound." Appendix C,* p. 8a.

Thus, the record in *Coxsey* discloses the painstakingly careful preparations in which the FAA engaged when it invoked its powers under §1353 to undertake or supervise development work leading to the creation of improved aircraft. There is nothing even remotely comparable in the instant record.

In any event, the short and complete answer to the invocation of §1353 here is its complete inapplicability since Secretary Coleman did not invoke this statutory provision in his February 4, 1976 Concorde decision, and as the Second Circuit had occasion to declare only last year in *NLRB* v. *Columbia University*, 541 F.2d 922, 930 (2d Cir. 1976):

"we recognize that it is 'a simple but fundamental rule of administrative law':

> [T]hat a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely* by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed 1995 (1947)." (Emphasis added).

2. At numerous times the Court queried counsel concerning the meaning to be accorded Secretary Coleman's

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*Renumbered Appendix III-C before the Second Circuit.

February 4, 1976 Concorde decision insofar as it relates to JFK. Thus, the Court asked Mr. Nickles, "where does he [Secretary Coleman] use the words 'I direct that they land' instead of 'I authorize them to do so'?". Tr. p. 32. And Port Authority counsel was asked, "Didn't he [Secretary Coleman] say . . . I have decided to permit two landings a day for each of these airlines at JFK?" And "What does the word 'permit' mean? Does that mean permit if it pleases the Port Authority?" Tr. p. 77.

Assuredly, Secretary Coleman, one of the nation's outstanding lawyers, a *magna cum laude* graduate of Harvard Law School and a Law Secretary to Justice Frankfurter, knew how to use the English language with clarity and precision and did so in his 61 page decision, employing the words "ordering" and "directing" when they expressed his intent, and utilizing the words "authorizing" and "permitting" when those words conveyed his meaning. Secretary Coleman knew, as any good lawyer knows, the world of difference between the words "authorization" and "permission" on the one hand and "direction" and "order" on the other. He ordered the FAA to accept the Concorde at Dulles; he ordered the FAA to issue operations specifications permitting Concorde flights at Dulles and JFK. Nowhere did he order the Port Authority to accept Concorde flights at JFK.

3. The Court asked Mr. Wells whether "there has been any attempt by the airlines to obtain clarification or intervention of the Secretary of Transportation or the Federal Administrator in this controversy", Tr. p. 62, and later whether anybody "had approached the Secretary of Transportation to find out whether he meant his order positively?" Tr. p. 63. The answers given by Messrs. Wells and Nickles to the Court's questions were not clear. The answer is that Secretary Coleman, and later his successor, Secretary Adams, as well as President Carter, commented on whether the February 4, 1976 Concorde decision merely

granted Federal authorization for Concorde operations at JFK or was intended to prevent the Port Authority from banning such flights. And, on each occasion, Secretaries Coleman and Adams, as well as President Carter, said the former was the case, not the latter. The last response was by the President on May 2nd of this year.

A. Exactly one week after Secretary Coleman rendered his decision, he appeared before the Subcommittee on Aviation of the House Committee on Public Works and Transportation for the purpose of discussing with the Subcommittee his decision which he characterized as "permitting British Airways and Air France to conduct limited scheduled Concorde operations to and from the United States for a trial period . . ." *(Hearings on Current and Proposed Federal Policy on the Abatement of Aircraft Noise conducted by the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 94th Cong., 1st and 2d Sess. at 565 (1975-76) (hereinafter referred to as Aircraft Noise Policy Hearings)).* At the hearing both Chairman Anderson and Congressman Goldwater questioned him on the meaning of the footnote on page 6 of his decision alluding to the fact that "under Federal policy that hitherto prevailed a local airport proprietor has the authority under certain circumstances to refuse landing rights."

Secretary Coleman advised Congress that a Port Authority ban on Concorde operations would be invalid only if it placed an undue burden on interstate and foreign commerce or discriminated unreasonably against that aircraft.[5] This conclusion was given in response to a question posed by Congressman Norman Mineta who specifically asked:

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[5] The possible issues of burden on commerce and unreasonable discrimination are not before the Court on the airlines' current motion for summary judgment.

"Does the Port Authority, as the local sponsor of JFK, have the authority to ban any and all scheduled Concorde service at JFK on the ground of noise impact?"

The Secretary's complete answer follows:

"Answer. The answer to this question is not simple and not within my power to resolve. At present, it is our view that such action by an airport proprietor which is non-discriminatory and not an unreasonable burden on foreign or interstate commerce has not been preempted by FAA action. Depending on the manner in which the Port Authority or the States of New York and New Jersey take such action, it could be found to place an undue burden on foreign commerce or to discriminate unreasonably." (*Aircraft Noise Policy Hearings,* p. 705).[6]

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[6] Even prior to rendering his decision Secretary Coleman stated that before British Airways and Air France can utilize JFK for Concorde operations they not only needed Federal permission granting amendments to their operations specifications but also the permission of the airport operator. This statement was made by the Secretary at a Press Conference held on November 13, 1975, Appendix D* to this memorandum, at which the Secretary announced that he would conduct public hearings on the Concorde issue on January 5, 1976 and outlined the issues to be addressed at those hearings. The pertinent questions and the Secretary's answers follow:

"Press: Mr. Secretary, is one of the things you're going to be considering between now and January the possibility of allowing it in one airport but not in the other; say, allowing it at the federal facility at Dulles but not allowing it at the Port of New York facility at JFK?

"Secretary Coleman: Well, as you know, this problem really breaks down into two parts. Whenever anyone wants to fly an aircraft into this country, it has to be on the Operational Specifications. The FAA, a federal agency, has that authority. In addition, since the FAA and the federal government owns Dulles, a decision that you are going to amend the specification necessarily is a decision that it can land at Dulles. Now, when you get to the question of Kennedy, you have a different problem in that the convention under which we have relation-

*Renumbered Appendix III-D before the Second Circuit.

B. After the Port Authority adopted its temporary ban on Concorde operations at JFK, Secretary Coleman reviewed the validity of the ban as he had promised Con-

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ships with the United States says that the airplane has a right to come into the United States, but that the local airport people have authority with respect to noise levels, and there is a question as to whether under the treaty just what would the people who control Kennedy do, and what under the law are they able to do. On the other hand, I am sure that the people at Kennedy are looking at the problem, and I guess only after I decide, if I do decide, that the specifications can be amended, or should be amended, in the way that the French and the British have requested, do we then get to the second question. Appendix D*, pp. 14a-15a.

* * *

"Press: Mr. Secretary, did you mean to be understood to say that you in certain circumstances wouldn't have the final authority on the New York ..... as well as the Dulles airport?

"Secretary Coleman: Well, what I said was that once you decide that the specifications should be amended, you then are put back to the treaty, and we have read the treaty, and I'm pretty sure the British have, and we have to make a determination—first, obviously if we decide that the specifications should be amended, if we then decide that it should land at Dulles—none of which I've done yet—then at that point JFK would have to make a decision as the operator as to what it's going to do, and once it makes the decision, and I hope it makes it with the same degree of care that I hope I make it with, then, assuming if they say that it can land, that ends the problem. If they say it cannot land, and if the French and the British for some reason don't accept that decision, then I'm pretty sure that there will be a reading of the treaties, and then we would have to determine under the treaties as to what the agreement and meaning was of those treaties.

"Press: To answer my question, does that leave you with the final determination?

"Secretary Coleman: No, sir. It leaves me the final determination if the treaties are read one way. If not, it doesn't leave me the final determination. There is a special provision in there with respect to noise standards which are nondiscriminatory, and I think that is one of the issues that I will have to address, but I first have to get over the initial hurdles as to what do I do as far as the request to amend the specifications." Appendix D*, pp. 15a-16a.

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*Renumbered Appendix III-D before the Second Circuit.

gress he would. In a statement released on March 24, 1976 and attached to our Answer in this case, the Secretary did not declare that the Authority's ban was invalid because it conflicted with his decision nor did he determine that it invaded a field preempted by the Federal Government. Instead, he expressed disappointment with the Port Authority's action. The Secretary's March 24 statement, however, was made in recognition of the existing Federal policy that airport proprietors can refuse landing rights to noisy aircraft. In addition his statement implicitly acknowledged that his Concorde decision did not take away any such right from the Port Authority and that the long-standing Federal policy would not be changed to overturn the Port Authority's temporary ban. Thus, he said that footnote 6 contained in his Concorde decision

> "was made in recognition of the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority . . For the present this remains the policy of the department." See pp. 44-45 of our August 17, 1976 memorandum.

C. On November 18, 1976, Secretary Coleman released the FAA Airport Noise policy as part of a comprehensive Department of Transportation—Federal Aviation Administration Statement entitled *Aviation Noise Abatement Policy* (ANAP), a copy of which was attached to our supplemental memorandum, dated January 7, 1977, submitted in opposition to plaintiffs' motion for summary judgment. As we pointed out in our supplemental memorandum, the comprehensive DOT-FAA policy statement convincingly demonstrates that the Port Authority's temporary ban on Concorde operations at JFK is entirely consistent with all relevant statutes, treaties and policies in this field. The ANAP not only states unequivocally that airport proprietors can control what types of aircraft use their airports (ANAP, p. 34) but states that the airport proprietors' power so to do is:

"subject *only* to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management." (ANAP, p. 34, Emphasis added).

D. The new Secretary of the Department of Transportation, Brock Adams, has also made clear his opinion that Secretary Coleman's Concorde decision does not prevent the Port Authority from determining for itself whether or not the Concorde should be permitted to land at JFK. At a news conference held on April 15, 1977, Appendix E* to this memorandum, Secretary Adams was asked:

"is there no way that the Federal Government can open up Kennedy to Concorde flights? Is there nothing at all you can do?"

Secretary Adams' response to this question was as follows:

"Not without changing the whole basic policy of approach that has occurred in the United States to this point, which is that we go with certification of aircraft and with noise rules, and the individual airports determine the so-called footprint or operating noise specifications of their individual fields. And so, we have been observing with our French and British friends precisely the rules we apply here." Appendix E,* p. 28.

E. The news conference in question was called in connection with the release by DOT-FAA of the FAA's Draft Environmental Impact Statement on Noise Regulation and Type Certification Alternatives for Civil Supersonic Aircraft (hereinafter DEIS).[7] This DEIS concludes that air-

[7] Extracts from the DEIS are contained in Appendix F** to this memorandum.

*Renumbered Appendix III-E before the Second Circuit.
**Renumbered Appendix III-F before the Second Circuit.

port operators such as the Port Authority have the power to ban supersonic aircraft from their airports for noise reasons. The DEIS considers the probable environmental impact of unlimited operations of first-generation SST's (Concorde SST) at 12 major U.S airports including among others, Dulles and JFK. In this connection it points out that:

> "Only Dulles is federally operated and, therefore, only federal approval is required for Concorde operations. The other airports are operated by the local or regional authorities whose authorization must also be obtained for the Concorde to operate." Appendix F*, p. 47a.

Again, the DEIS emphasizes:

> "As noted earlier, the operators of any aircraft must obtain whatever authorization is necessary from the airport operator prior to the initiation of service at that airport. Such authorization could depend, in some cases, on complying with noise limits specified by the airport operator. The Port Authority of New York and New Jersey which owns and operates JFK has established a 112 PNdB maximum noise level for aircraft on takeoff from JFK measured at specific points within adjacent communities. The Los Angeles Department of Airports, the operators of Los Angeles International Airport (LAX) has adopted a resolution which requires all air carriers to have their fleet serving LAX meet FAR Part 36 (1969) noise levels over a five year period. The relationship of the supersonic aircraft to these noise limits has been discussed previously." Appendix F*, p. 53a.

It is significant that the above conclusions were reached even though the DEIS contemplates that FAA-prescribed noise abatement departures will be used and that all operations will be between the hours of 7:00 A. M. and 10:00 P. M. "in accordance with the DOT decision and policy concern-

*Renumbered Appendix III-F before the Second Circuit.

ing Concorde operations at Dulles and Kennedy International Airports." Appendix F*, p. 49a.

F. Finally, this week, President Carter again made it clear that there is no way that Secretary Coleman's Concorde decision can be construed as preventing the Port Authority from making its own determination as to whether to admit the Concorde at JFK. In an interview by David Dimbleby, Carl Weiss, and Emmanuel De La Taille, Appendix G** to this memorandum, the President made it clear that although he favors a 16 month trial period for the Concorde at JFK, there is nothing the Federal Government can do to force the Port Authority to permit the Concorde to conduct such a demonstration. The President said:

> "My position is very clear. I support the decision made by President Ford and his Administration in authorizing a 16-month trial period for the Concorde, both at Dulles Airport, which the Federal Government controls, and also at the John F. Kennedy Airport, which is controlled by local authorities in New York.
>
> "As you know, where the Federal Government has had that authority, the test flights are now being conducted by Concorde at Dulles, near Washington. I have no authority at all over the New York Port officials—" Appendix G**, p. 54a.
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> * * *
>
> "We also have a similar Constitutional division of authority between local governments—that is, the State and the city on the one hand compared to the President. I have no authority at all to tell the Governor of New York State or the Mayor of New York City or the New York Port Authority what to do with the Concorde. We have made our Federal position clear, that we prefer to see John F. Kennedy Airport open to the Concorde for the 16-month period." Appendix G**, p. 55a.

*Renumbered Appendix III-F before the Second Circuit.
**Renumbered Appendix III-G before the Second Circuit.

No reason is suggested why this Court should not effectuate this clearly expressed intent of the Federal Government's Executive Branch to respect Congressional intent and therefore to leave the ultimate decision at JFK up to the Port Authority. A substantial question of law would have been presented here if Mr. Coleman, in spite of Congress' manifest intent to preserve proprietary rights, had ordered the Port Authority to admit the Concorde to JFK. But we fail to see how it can be argued that Mr. Coleman lacked the power to refrain, as he knowingly did, from giving such an order to the Port Authority. Even if we were to assume, *arguendo*, that Mr. Coleman possessed such power, he still had sound practical reasons for taking the action that he did, since, unlike Dulles, JFK is a heavily noise-impacted airport and it makes considerable sense for Mr. Coleman to have ruled, as he did, that although he welcomed a trial period for the Concorde at JFK, the ultimate decision would be up to the Port Authority, the entity that would be held monetarily liable for the consequences.

4. The Court asked Port Authority counsel "Is a noise standard of the Port Authority a law or a regulation within the meaning of Article 5 of the bilateral agreements?" Tr. p. 95. His response—that a Port Authority noise standard is a law or regulation of the United States within the meaning of Article 5 of the bilateral agreements—is clearly correct.

On April 22, 1977, Ambassador Alan Boyd, who is representing the United States in the negotiations between the United States and the United Kingdom in connection with the Bermuda Agreement, has recently taken the same position. In a briefing[8] on the US-UK air negotiations on that date Ambassador Boyd stated:

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[8] Extracts from the transcript of the briefing are contained in Appendix H* to this memorandum.

*Renumbered Appendix III-H before the Second Circuit.

"The position the United States takes is that any aircraft operated by a party to the agreement should be permitted to fly to and from the United States so long as it complies with laws and regulations and the position the United States has taken is that the laws and regulations are both state and local and that it is a matter of domestic law and interpretation of domestic law as to whether the Port of New York Authority has, in fact, the power to issue noise regulations and to as a result of those noise regulations ban the use of any type of aircraft.

"Q. Then what is the use of negotiating if the government is a local jurisdiction can practically—

"AMBASSADOR BOYD: That is the point the United Kingdom has been making, but the facts are that whatever the laws of any government may be the executive agreements that that country enters into is going to be subject to those laws.

"I shouldn't say 'any country', but in the United States and we have made that clear all along.

"International agreements do not in any way change our constitution. We don't amend our constitution by entering into treaties or executive bilateral agreements." Appendix H,* pp. 57a-58a.

The above statements made by Ambassador Boyd were characterized by him as a summary of the response that our State Department had given to Mr. Patrick Shovelton, Deputy Secretary of State for Trade, United Kingdom, when queried by him on the issue of the Port Authority's right to ban the Concorde at New York.

5. The Court asked Port Authority counsel whether the Port Authority can prevent an unscheduled SST from landing at JFK. Tr. p. 97. His affirmative answer was the same as that given by Secretary Coleman. As our August 17, 1976 memorandum points out (pp. 55-56), Secretary

*Renumbered Appendix III-H before the Second Circuit.

Coleman concurred in this view on February 10, 1976, just six days after his Concorde decision, when he advised the Subcommittee on Aviation of the House Committee on Public Works and Transportation that under Article 11 of the Chicago Convention, aircraft must comply with regulations promulgated by local airport operators. The same view was likewise recently taken by Ambassador Boyd: See sub-point 4 above.

6. The Court asked counsel for the respective parties what rational difference is there between a local government's exercise of the police power and its exercise of proprietary authority. Tr. pp. 102-3; see also pp. 67, 79. The difference is, as Port Authority counsel stated, and as Congress itself recognized, one of liability. When a government exercises the police power it incurs no liability, while if it exercises proprietary authority, it is, as *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) holds, the party monetarily responsible for damage to neighboring property owners.

7. The Court asked counsel for the plaintiff airlines whether their clients were advised prior to Secretary Coleman's Concorde decision whether they would need Port Authority permission to land even if they receive full Federal authorization. Tr. pp. 61-62. The answer, of course, is yes. The history of the Port Authority's regulations regarding jet aircraft is set forth extensively on pages 5 to 11 of our August 17, 1976 memorandum. In that connection we call the Court's attention to the following statement contained in testimony before two Congressional subcommittees submitted in 1959 by the Port Authority's then Director of Aviation:

> "The procedures first suggested by Pan American served as the basis for the conditions under which the port authority granted permission to Pan American and BOAC [the predecessor of plaintiff British Airways

> Board] for the regularly scheduled operations of the Boeing 707-120 and the Comet IV, respectively, at New York International Airport [JFK] beginning October 4, 1958." (As quoted on p. 9 of our August 17, 1976 memorandum.)

Furthermore, as our August 17, 1976 memorandum observes, Secretary Coleman was familiar with this history. See pp. 10-11. That memorandum also quotes the language contained in the final Environmental Impact Statement on the Concorde categorically declaring that "Prior to . . . initiation of regularly scheduled commercial operation of the Concorde, the operator of the aircraft must obtain the necessary authorizations from the operator(s) of the specific airport(s) involved," expressly noting that the Port Authority has had a longstanding noise level of 112 PNdB at JFK. See p. 47. Thus, there can be no question but that both of the plaintiff airlines in this case knew prior to Secretary Coleman's February 4, 1976 decision that they would need Port Authority permission to land even if they were to receive full Federal clearance.

8. The Court referred to *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132 (1963), as holding that "if there is a conflict in the exercise of the respective powers, federal and local, the local has to give way" Tr. 106. The Court then suggested that there might be such a conflict between Secretary Coleman's decision and the Port Authority's temporary ban since the one is saying "let them in for a try" and the other is saying "nothing doing." Tr. pp. 119-120. However, the *Avocado* case serves only to show that there is here no conflict between the Secretary's decision and the Port Authority's ban. At issue in *Avocado* was the validity of a California statutory provision relating to the maturity of avocados which excluded from California markets avocados that met Federal maturity standards promulgated by the Secretary of Agriculture but were unable to meet a California require-

ment of an 8% oil content. Justice Brennan, in writing for the Court, posed the question presented as:

> "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable." 373 U.S. at 141.

The question here can be phrased in almost identical terms —whether the Port Authority may constitutionally refuse landing rights to an aircraft which the Federal authorities have certified as appropriate to operate at JFK.

Writing for the Court, Justice Brennan stated that the answer to this question

> "depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [Citation]." 373 U.S. at 141.

The Court then went on to rule:

> "By that test, we hold that §792 [the California provision in question] is not such an obstacle; there is no such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." 373 U.S. at 141.

Similarly here, as our August 17, 1976 memorandum made plain, "the full purposes and objectives of Congress" in entering the aircraft noise abatement field were to aid in alleviating the noise problem without in any way diluting the airport proprietors' responsibility for playing a major role in its solution. The Congressional purpose was to alleviate the adverse effect of aircraft noise on airport neighbors by utilization of both FAA and airport proprietor regulations. The legislative history of the 1968 Noise Certification Act (§611) and its contemporary construction show a clear Congressional intent to permit airport proprietors to ban noisy aircraft at their airports

even though such aircraft might meet Federal noise standards. Thus, Congress itself has determined that there is no conflict between Federal regulations that permit a given aircraft type to operate at United States airports and an airport proprietor's restriction that keeps such type out.

This clear Congressional determination of no conflict was recognized and applied by the FAA when it promulgated its noise rules, 14 C.F.R. Part 36, under the newly enacted statute. Thus, the FAA stated in the preamble to Part 36:

> "Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce." 34 Federal Register 18355, November 18, 1969.

Finally, we point out that in determining the issue of conflict, the Supreme Court concluded in the later case of *Board of Locomotive Engineers* v. *Chicago, Rock Island and Pacific RR,* 382 U.S. 423 (1966), that the Court's duty is to defer to Congressional policy determinations by carefully searching the applicable legislative history.[9] Congres-

[9] The issue of possible conflict between Federal regulations and those of airport proprietors was reviewed in the legislative history of the 1968 Noise Certification Act. Thus, although Secretary Boyd concluded that State and local governments are precluded from using their police power to control aircraft noise because such regulation would conflict with Federal regulation of air traffic and would invade a field preempted by the Federal Government (see the Port Authority's August 17, 1976 memorandum, pp. 26-30), he, nevertheless, concluded that airport proprietors, even after the adoption of the proposed aircraft noise amendment which be-

sional intent, the Court emphasized, is the touchstone for decision, and, in this connection, it concluded that there is no requirement for the Federal legislation to contain an ex-

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came §611, could continue to deny use of their airports on the basis of noise considerations. Secretary Boyd's views were expressly concurred in by the Report of the Senate Commerce Committee on HR 3400, S. Rep. No. 1353, 90th Cong. 2d Sess. at p. 6 (1968).

The legislative history of §611 in the House of Representatives was also directed to the conflict and preemption issues. These issues were specifically raised by the Air Transport Association (ATA) urging the adoption of a substitute bill designed to effectuate full Federal preemption. Full preeemption, the ATA asserted, was needed to invalidate the Port Authority's jet terms and conditions:

> "The principal problem in attempted local regulation has not been by way of noise ordinances adopted under the police power, but purported 'lease conditions' imposed by the airport operator as landlord. For example, the Port of New York Authority's well-known '112-PNdB' rule is enforced against carriers operating at the New York airports, under the alleged right of the Port as operator of the airport to control the conditions of its use." *(Hearings Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on HR 3400 and HR 14146, Aircraft Noise Abatement, 90th Cong. 1st and 2d Sess. p. 100).*

After reviewing the cost of complying with the Port Authority's conditions, the ATA statement emphasized the necessity for full preemption because:

> "Until now, the New York airport regulation has been upheld by the courts as not in conflict with any existing Federal certification or regulation." (citations omitted.) *Id.*

In a letter submitted to the House Subcommittee on Transportation and Aeronautics, commenting on the ATA proposal as well as on HR 3400, the Department of Transportation advised that an airport proprietor's rule-making power does not conflict with the Federal authority to regulate air traffic:

> "As a practical matter, and as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator, in the exercise of its proprietary function, to limit on noise grounds the kind of aircraft which may use its facility. The Department is firmly convinced that such authority in the

press reservation of State power before the local regulation can be upheld.

Thus, we return to the main theme of our August 17, 1976 memorandum—what did Congress intend? We have shown, we believe, that, from the time of the passage of the Air Commerce Act of 1926 to the present, Congress has clearly determined that the regulation of air commerce in the United States should be provided through a coordinated relationship between the Federal Government and local airport operators, the former operating the airways and the latter the airports, adopting noise standards to the precise conditions at their individual terminals. And under that relationship it is Congress that has ordained, as the report of the Senate Committee on the 1968 Noise Certification Amendment, states:

> "The Federal Government should not substitute its judgment for that of the . . . elements of local government who . . . own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding

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airport operator should continue." *House Hearings on H.R. 3400, p. 9.*

"We do not believe that the mere presence of authority in the Federal Government to certify for noise purposes, or the exercise of that authority, should foreclose an airport operator from exercising his judgment or responding to the desires of the community with respect to aircraft noise." *Id.*

It continued:

"An action by an airport proprietor to exclude aircraft which exceed noise levels established by him does not conflict with the Federal authority to regulate air traffic." *Id.*

any aircraft on the basis of noise considerations." S. Rep. No. 1353, 90th Cong. 2d Sess. at p. 7 (1968).

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May 6, 1977

## SUPPLEMENTAL ARGUMENT OF PORT AUTHORITY DEFENDANTS-APPELLANTS ON APPEAL TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

### The Court Below Erred In Holding That the Port Authority's Ban On Concorde Operations Conflicts With Secretary Coleman's February 4, 1976 Decision.

The holding by the District Court that the Port Authority's temporary ban on Concorde flight conflicts with Secretary Coleman's decision is in error. From statements made by Secretary Coleman both before, in, and after his decision, as well as from statements made by his successor, it is clear that all Secretary Coleman did was to grant the plaintiff airlines whatever authorizations or permissions they needed under Federal law in order to commence Concorde operations at Dulles and JFK airports. Specifically, he did not authorize them to use JFK without the Port Authority's permission.

On November 13, 1975, in releasing the final Environmental Impact Statement on the Concorde and the notice of a public hearing with regard to the Concorde question, Secretary Coleman in clear and unambiguous language stated that

> "today I have released a copy of the Environmental Impact Statement on the applications of Air France and British Airways for amendment of their operations specifications. If granted, the amendments would authorize the carriers to operate Concorde Supersonic Aircraft in limited commercial service to New York and Washington *provided the airport operators agree.*" (Addendum, emphasis added).

On February 4, 1976, following the public hearing, Secretary Coleman issued his decision with regard to the re-

quest of British Airways and Air France, made pursuant to 14 C.F.R. §129, that their operations specifications be amended to permit the Concorde SST to operate in limited scheduled commercial service from London and Paris to New York and Washington, D.C.—namely, not more than four flights per day into JFK and not more than two flights per day into Dulles during day-light hours utilizing noise abatement thrust reduction procedures on departure.

By his decision Secretary Coleman denied the airlines' request for permanent amendments to their operations specifications, but directed the FAA to order provisional amendments thereto for the conduct of the requested commercial services for a demonstration period of no longer than 16 months. Secretary Coleman's decision on the amendments to the operations specifications was made after an extensive review of the environmental factors involved and an evaluation of the proper balance between environmental quality, international relationships and technological advances in accordance with the mandate of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.

His decision, however, draws a sharp distinction between Concorde flights at Dulles and JFK. Thus, his decision provides that:

> "The FAA is the proprietor of Dulles and it is therefore part of my decision today to direct the Federal Aviation Administrator to permit one Concorde flight per day at Dulles by each carrier under the conditions noted." (Joint Appendix, p. 53a).

With regard to JFK, however, he pointed out that the situation

> "may be complicated by the fact that under federal policy that has hitherto prevailed a local airport pro-

prietor has had authority under certain circumstances to refuse landing rights." *Ibid.*

But even more conclusive, the Secretary's decision itself acknowledges that the airlines must comply with the Port Authority's noise regulations. Thus, Appendix I to his Decision "Secretary of Transportation's Comments on Safety" states:

> "The other major concern about safety that is within the FAA's jurisdiction is the ability of the Concorde to execute the left turn off of Runway 31 Left at JFK, *which will be necessary to comply with the Port Authority's noise regulations.*" (Joint Appendix, p. 115a, emphasis added).[1]

Exactly one week after Secretary Coleman rendered his decision, he appeared before the Subcommittee on Aviation of the House Committee on Public Works and Transportation for the purpose of discussing with the Subcommittee his decision. *(Hearings on Current and Proposed Federal Policy on the Abatement of Aircraft Noise conducted by the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 94th*

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[1] The left turn noise abatement departure procedure from Runway 31 Left developed by the airlines for the purpose of compliance with Port Authority noise requirements, is one of the required noise abatement procedures set forth in §B of the operations specifications for Concorde operations at JFK (§B. 3.). Joint Appendix, p. 362a. The relationship between the other noise abatement departure procedures specified in §B of such operations specifications and the Port Authority's noise restrictions for supersonic jet aircraft are set forth in the final Environmental Impact Statement. (Joint Appendix, Appendix I-E, pp. I-55a, I-56a.)

The safety of the left turn from Runway 31 Left which the airlines hoped would enable them to comply with the Port Authority's noise regulations, was also one of the issues which Secretary Coleman said would be relevant to his Concorde decision. (Notice of Public Hearing, Concorde Flights to John F. Kennedy International Airport and Dulles International Airport, issued November 13, 1975, published 40 Fed. Reg. 53612, 53614-5 (Nov. 19, 1975)).

*Cong., 1st and 2nd Sess., p. 565 (1975-76) (hereinafter referred to as Aircraft Noise Policy Hearings))*. At the hearing Secretary Coleman was questioned on the meaning of that part of his decision alluding to the fact that "under Federal policy that hitherto prevailed a local airport proprietor has the authority under certain circumstances to refuse landing rights." Congressman Norman Mineta specifically asked:

> "Does the Port Authority, as the local sponsor of JFK, have the authority to ban any and all scheduled Concorde service at JFK on the ground of noise impact?"

The Secretary's complete answer follows:

> "Answer. The answer to this question is not simple and not within my power to resolve. At present, it is our view that such action by an airport proprietor which is non-discriminatory and not an unreasonable burden on foreign or interstate commerce has not been preempted by FAA action. Depending on the manner in which the Port Authority or the States of New York and New Jersey take such action, it could be found to place an undue burden on foreign commerce or to discriminate unreasonably."[2] (*Aircraft Noise Policy Hearings,* p. 705).

Secretary Coleman assured the Subcommittee that he would look into the legality of any action which the Port Authority might subsequently take to ban Concorde service at JFK. (*Aircraft Noise Policy Hearings,* p. 676). Thus, after the Port Authority adopted its temporary ban on Concorde operations at JFK, Secretary Coleman reviewed the validity of the ban. In a statement released on March 24, 1976, the Secretary, although he expressed dis-

[2] The possible issues of burden on commerce and unreasonable discrimination are not before the Court on the airlines' current motion for summary judgment.

appointment with the Port Authority's action, did not suggest that the Authority's ban was invalid because it conflicted with his decision. Rather, the Secretary's March 24 statement recognized the existing Federal policy that airport proprietors can refuse landing rights to noisy aircraft and acknowledged that his Concorde decision was not intended to change such policy to take away the Port Authority's right to ban the Concorde. Thus, he said that footnote 6 contained in his Concorde decision

> "was made in recognition of the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights. For the present this remains the policy of the department." [3] (Joint Appendix, p. 46a).

On November 18, 1976, Secretary Coleman released the FAA Airport Noise Policy as part of a comprehensive Department of Transportation—Federal Aviation Administration Statement entitled, "Aviation Noise Abatement Policy" (ANAP). The comprehensive DOT-FAA policy statement convincingly demonstrates that the Port Authority's temporary ban on Concorde operations at JFK is entirely consistent with Federal policy in this field. The ANAP not only states unequivocally that airport proprietors can control what types of aircraft use their airports (ANAP, p. 34) but states that the airport proprietors' power so to do is:

> "subject *only to* Constitutional prohibitions against creation of an undue burden on interstate and foreign

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[3] Mr. Coleman's March 24, 1976 statement was commented on as follows by Judge Foley in *Brown* v. *Carey*, —— F.Supp. ——, No. 76-CV-103, (N.D.N.Y. 1976):

> "It is interesting to note that on March 24, 1976, the Secretary stated that it was established federal policy that a local airport proprietor under certain circumstances has had authority to refuse landing rights, and for the present it remains the policy of the department of transportation."

commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management." (Joint Appendix, Appendix II, p. II-34, emphasis added).

The new Secretary of the Department of Transportation, Brock Adams, has also made clear that Secretary Coleman's Concorde decision does not prevent the Port Authority from determining for itself whether the Concorde should be permitted to land at JFK. At a news conference held on April 15, 1977, Secretary Adams was asked:

"is there no way that the Federal Government can open up Kennedy to Concorde flights? Is there nothing at all you can do?"

Secretary Adams' response to this question was as follows:

"Not without changing the whole basic policy of approach that has occurred in the United States to this point, which is that we go with certification of aircraft and with noise rules, and the individual airports determine the so-called footprint or operating noise specifications of their individual fields. And so, we have been observing with our French and British friends precisely the rules we apply here." (Joint Appendix, Appendix III-E, p. III-20a).

The April 15, 1977 news conference by Secretary Adams was called in connection with the release by DOT-FAA of the FAA's Draft Environmental Impact Statement on Noise Regulation and Type Certification Alternatives for Civil Supersonic Aircraft (hereinafter DEIS). This DEIS concludes that airport operators such as the Port Authority at JFK have the power to ban supersonic aircraft from their airports for noise reasons. The DEIS con-

siders the probable environmental impact of unlimited operations of first-generation SST's (Concorde SST) at 12 major U.S. airports including among others, Dulles and JFK. In this connection it points out that:

> "Only Dulles is federally operated and, therefore, only federal approval is required for Concorde operations. The other airports are operated by the local or regional authorities whose authorization must also be obtained for the Concorde to operate." (Joint Appendix, Appendix III-F, p. III-47a).

Again, the DEIS emphasizes:

> "As noted earlier, the operators of any aircraft must obtain whatever authorization is necessary from the airport operator prior to the initiation of service at that airport. Such authorization could depend, in some cases, on complying with noise limits specified by the airport operator. The Port Authority of New York and New Jersey which owns and operates JFK has established a 112 PNdB maximum noise level for aircraft on takeoff from JFK measured at specific points within adjacent communities. The Los Angeles Department of Airports, the operator of Los Angeles International Airport (LAX) has adopted a resolution which requires all air carriers to have their fleet serving LAX meet FAR Part 36 (1969) noise levels over a five year period. The relationship of the supersonic aircraft to these noise limits has been discussed previously." (Joint Appendix, Appendix III-F, p. III-53a).

It is significant that the above conclusions were reached even though the DEIS contemplates that FAA-prescribed noise abatement departures will be used and that all operations will be between the hours of 7:00 A.M. and 10:00 P.M. "in accordance with the DOT decision and policy

concerning Concorde operations at Dulles and Kennedy International Airports." (Joint Appendix, Appendix III-F, p. III-49a).

The above discussion leaves no doubt that Secretary Coleman did not intend to order, and did not believe he was ordering, Concorde flights into JFK without the permission of the Port Authority. Furthermore, the present Secretary so interprets Secretary Coleman's decision and agrees with its soundness.

The fact of the matter is that throughout Secretary Coleman's long decision-making process and indeed at every stage therein all concerned, including the Governments of Great Britain and France, were fully advised that a favorable decision by Secretary Coleman on their requests for amendments to their operations specifications would not be sufficient to permit Concorde operations at JFK without the permission of the Port Authority, the proprietor of the airport. In addition to the above quoted statements the need for Port Authority consent was also clearly articulated in both the draft and final Environmental Impact Statements. (See Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, pages I-46-I-47).

Furthermore, Secretary Coleman's decision, as interpreted by himself and his successor, is in accordance with the long standing Federal policy that airport proprietors should be permitted to ban noisy aircraft in order to protect themselves from liability for aircraft noise imposed on them in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). It is also compatible with the conclusion expressed by the Secretary of Transportation in 1968 that an airport proprietor's regulation banning noisy aircraft compliments, rather than conflicts with, FAA regulations adopting aircraft noise standards, a conclusion concurred in by the Senate Commerce Committee in its report on the 1968 law,

§611 of the Federal Aviation Act, U.S.C. §1431, which for the first time empowered the FAA to certificate aircraft on the basis of noise considerations (See Defendants' Memorandum of May 6, 1977, pp. I-18-I-20).

Moreover, even if it were found that the February 4, 1976 Concorde decision is ambiguous on the issue under discussion, the District Court's ruling is, nevertheless, erroneous since, as demonstrated above, it interprets Secretary Coleman's decision contrary to the way both the Secretary himself and his successor have interpreted it. In *Udall* v. *Tallman*, 380 U.S. 1, *rehearing denied*, 380 U.S. 989 (1965) the United States Supreme Court ruled that an administrator's interpretation of his own order was entitled to controlling weight unless clearly erroneous. *Udall* held that the Secretary of Interior's interpretation of his own orders, although not the only one permitted by their language, was a reasonable interpretation, and therefore must be respected by the judiciary. The Court, after setting down the well established rule that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration", went on to state that:

> "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
>
> 'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * [*T*]*he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*' (citation omitted)" 380 U.S. at 16-17. (emphasis added).

In conclusion, we submit that (a) the wording of Secretary Coleman's decision itself, (b) the statements he made before and after the rendition of his decision, (c) the statements of his successor as to the meaning of that decision, (d) the long-standing Federal policy that airport proprietors should be permitted to ban noisy aircraft and (d) the required deference, as articulated in *Udall*, that the courts give to an administrator's interpretation of his own decision leave no doubt that the Port Authority's ban on Concorde flights is in all respects valid and the District Court's finding to the contrary is clearly erroneous.

In light of the foregoing we respectfully submit that the decision below should be reversed.

Respectfully submitted,

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# ADDENDUM

THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

November 13, 1975

To Those Interested in the Concorde:

Today I have released a copy of the Environmental Impact Statement on the applications of Air France and British Airways for amendment of their operations specifications. If granted, the amendments would authorize the carriers to operate Concorde supersonic aircraft in limited commercial service to New York and Washington provided the airport operators agree. Since the Federal Aviation Administration has jurisdiction over Dulles, a decision on the operations specifications necessarily also embraces a decision on landing at Dulles. I am also releasing a copy of the issues as I have analyzed them. We have released this Statement and a statement of the issues early because of the intense public interest in the environmental impact of the Concorde and the procedure I will follow in reaching a decision.

On January 5, 1976, I will personally hold a public session in Washington for six hours to hear the views of interested groups addressed to issues relevant to the decision. A copy of the hearing notice is enclosed. If you desire to be heard, please note the particular issues you intend to address. I intend to reach a final decision not later than February 4, 1976.

The Environmental Impact Statement prepared by the Federal Aviation Administration is detailed and thorough. We are therefore not recirculating it as a draft. We welcome any comments you may have, either endorsing its conclusions or pointing out what you take to be inaccura-

cies. If, after the hearing, we are convinced that amendment to the final statement is necessary, we will either revise or supplement it.

I look forward to the public session in reaching a decision on this complex and important matter. When it is concluded, I will issue a formal decision paper.

/s/ William T. Coleman, Jr.
William T. Coleman, Jr.

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